

Spring 1999

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Recommended Citation

Peter T. Wendel, *Case against Plea Bargaining Child Sexual Abuse Charges: Deja Vu All over Again, The*, 64 MO. L. REV. (1999)

Available at: <https://scholarship.law.missouri.edu/mlr/vol64/iss2/2>

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The Case Against Plea Bargaining Child Sexual Abuse Charges: “*Deja Vu* All Over Again”

Peter T. Wendel*

There are few people in this world more despicable than child molesters.¹ I never dreamed that I would ever represent someone accused of such a heinous act.² Like most lawyers, I went to law school to “save the world,” or at least to try to make it a better place. But there really aren’t many “save the world” cases out there, and they’re usually *pro bono*. As a relatively young, debt laden attorney, I quickly realized that my chances of getting a “save the world” case were slim to none. That didn’t mean I had to accept an accused child molester as a client, but frankly, I needed the money. I agreed to represent him.

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1. In a poll of 1,000 adults asked to rank various crimes based on their heinousness, child abuse ranked almost at the top. See *Sin*, PEOPLE, Feb. 10, 1986, at 106, 108. “The child molester is commonly stereotyped as a ‘dirty old man’ or a ‘monster.’” A. Nicholas Groth et al., *The Child Molester: Clinical Observations*, 150 PLI/CRIM. 315, 316 (1989). “[T]he child molester is the recipient of the strongest societal anger and disapproval . . .” *Id.* at 317. The Journal of the American Medical Association defines child molesters as “older persons whose conscious sexual desires or responses are directed, at least in part, toward dependent, developmentally immature children and adolescents who do not fully comprehend these actions and are unable to give informed consent.” A. Kenneth Fuller, M.D., *Child Molestation and Pedophilia: An Overview for the Physician*, 261 JAMA 602, 602 (1989). Pedophilia is clinically defined as “recurrent intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a pubescent child or children (generally age 13 years or younger).” AMERICAN PSYCHIATRIC ASS’N., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-IV) § 302.2, at 527-28 (4th ed. 1994) [hereinafter AM. PSYCHIATRIC MANUAL]. For purposes of this Article, the term “child molester” will be used to denote both child molesters and pedophiles.

2. This is typically a defense lawyer’s reaction to defending child sexual abuse cases. See Marcia Chambers, *The Costs of McMartin to Defenders*, 12 NAT’L L.J. 13, (1990) (reviewing of Dean Gits’ experience defending Peggy McMartin Buckley).

The story made the front page of the newspaper, albeit the bottom half. The article's headline screamed out: "Coach Charged with Sexually Abusing Boy."³ I read on, wondering how the press was going to treat the case.

The head of a soccer club who has been praised for setting up one of the most successful youth programs was charged yesterday with 1 count of sexually abusing one of his players. The suspect, Ziegbert "Ziggy" Brukenfeld, runs the Kickers Soccer Club, U.S.A., the largest and most popular soccer club in the area. Each year the club takes several teams to Europe to compete in international tournaments, and many of the players have received scholarships to play soccer in college. Ziggy surrendered himself to the police late yesterday. Bond was set at \$25,000.⁴

I quickly flipped over to the sports section where there was another article rehashing the first one.

Although the newspaper articles lacked the details of the charge, the police report provided them.⁵ The complainant was one of the defendant's soccer players, a thirteen-year-old boy. One day after soccer practice, the boy and his family met the coach at a restaurant for dinner. The player alleged that near the end of dinner, the coach leaned over and whispered in the boy's ear: "What are you willing to do to succeed? Will you do whatever I ask?" The boy didn't answer. Then the coach allegedly tapped the boy on the shoulder and motioned for the boy to follow him to the restroom, which the boy did. While standing in front of the urinal, the coach unzipped his pants to reveal his erect penis. The coach allegedly asked the boy if he thought the coach's penis "was a big one?" When the boy didn't answer, the coach allegedly repeatedly asked the boy to

3. This Article is based upon a hypothetical case of child sexual abuse. Although the hypothetical may resemble one or more actual cases, the Article is really an amalgamation of several cases. In addition, while this Article is written in narrative form from the perspective of the defense attorney, the Author was not the attorney of record in any child abuse case upon which this Article may have drawn. The hypothetical case, and the issues it raises, could occur in any jurisdiction. To give the hypothetical the feel of a real case, however, at times the hypothetical borrows from *Missouri v. Muthofer*, 731 S.W.2d 504 (Mo. Ct. App. 1987). The facts, however, have been changed in several significant ways, and any similarity between the characters of the hypothetical and the *Muthofer* case is purely coincidental. The *Muthofer* case was selected, in large part, because of parts of the court's opinion, the importance of which will become apparent later.

4. Although this quotation is similar to a newspaper article relating to *Muthofer*, 731 S.W.2d at 504, it is intended merely as an example of the type of newspaper article one would see in sexual abuse cases.

5. Although the facts of the hypothetical case resemble the facts of *Muthofer* in some respects, there are significant differences. See *supra* note 3. For a review of the underlying facts of the *Muthofer* case, see *Muthofer*, 731 S.W.2d at 505-07.

touch his penis until the boy, feeling threatened, complied. The coach then allegedly told the boy the name of another player on the club who “did it” for him and stated that the boy “would have to do more stuff, too, later.” The two then returned to the table. After the group finished dinner and was leaving the restaurant, the coach allegedly admonished the boy not to tell anyone what had happened.

The coach was charged with sexual abuse in the first degree, a class C felony. If convicted, he could be sentenced to jail for up to seven years.⁶ He emphatically denied the boy’s allegations.

In the days and weeks that followed, the story received on-going newspaper coverage. While the story was newsworthy, I didn’t think it was *that* newsworthy. Granted, I had a vested interest in that belief—I didn’t want many people knowing that I was representing a child molester; I’m sorry, an *alleged* child molester. I had hoped the matter would die down quickly. Then I could do my best to take care of it quietly. After a while, however, I realized what was going on. The prosecutor’s office, with the press’s cooperation, was pushing the publicity, hoping to identify additional victims.⁷ But why should there be other victims?

No doubt the prosecution reasoned that people who engage in this type of sick behavior are just that: sick. Not so sick that they’re not criminally responsible for their actions, of course; but only a sick person would sexually

6. All 50 states have statutes that criminalize child molestation. See Meredith Sopher, Note, *The Best of All Possible Worlds: Balancing Victims’ and Defendants’ Rights in the Child Sexual Abuse Case*, 63 *FORDHAM L. REV.* 633, 640 (1994) (citing IRVING J. SLOAN, *CHILD ABUSE: GOVERNING LAW AND LEGISLATION* 105 (1983)). Each state has a variety of sexual offenses ranging from misdemeanors to felonies, each with differing possible terms of imprisonment. In recent years, most states have toughened their approach to sexual offenses, especially sexual offenses involving minors. For example, Missouri has reclassified sexual abuse from a class D felony to a class C felony, thereby increasing the maximum possible punishment from five years to seven years. See MO. REV. STAT. § 566.100 (1994). For the authorized terms of imprisonment, see MO. REV. STAT. § 557.021 and § 558.011 (West Supp. 1998). Missouri is representative of how most states treat sexual misconduct. (In the *Muthofer* case, the defendant was originally charged under the 1977 version of Section 566.100).

7. Publicizing the arrest of an alleged child molester in hopes of identifying additional victims is a common practice. See Linda Deutsch, *Sex-Abuse Trial Leaves Shock, Confusion, McMartin Case Has Victims, Not Villains*, *THE RECORD* (New Jersey), May 4, 1986, at A45 (discussing that the authorities sent a letter to potential abuse victims’ parents asking them to question their children about possible abuse); see also, e.g., Scott Hadly & Regina Hong, *Public’s Help in Molestation Cases Urged: Inquiry: Police Looking into Accusation in Port Hueneme and Ventura Think There are Alleged Victims who have not Reported to Authorities*, *L.A. TIMES*, May 30, 1997, at B4 (stating that the two reported arrests are “similar only in that the authorities in both instances believe the suspects may have molested other children and are asking for the public’s help in identifying other alleged victims”).

abuse a child.⁸ This sickness isn't like the chicken pox; you don't get it once and then develop an immunity to it. It's a perversion, a craving, which demands to be fed on a regular basis. Feeding the craving, however, provides only temporary relief. When the craving returns, it often returns with even greater intensity. It's highly unlikely that a person who suffers from such a sickness would sexually abuse a child only once and then kick the habit.⁹

No doubt the prosecution reasoned that if the defendant had abused this boy, especially in light of the brazen manner in which he did it, he probably had abused other boys. The victims of such abuse typically are young, vulnerable children who are either too embarrassed or too afraid to come forward and talk about it.¹⁰ The prosecutor's hope was that if there were other victims, they might

8. The American Psychiatric Association lists pedophilia in its manual of mental disorders. See AM. PSYCHIATRIC MANUAL, *supra* note 1, § 302.2. However, some researchers argue that most pedophiles are not mentally ill, but emotionally troubled, suffering from feelings of inadequacy, immaturity, vulnerability, helplessness, and isolation. See Groth, *supra* note 1, at 322; *Sentencing Sex Offenders*, 159 PLI/CRIM. 669, 677-79 (implying that a child molester's illegal sex acts may or may not be the result of a treatable psychological disorder). Similarly, researchers assert that child molesters cannot be lumped into one broad category, but may suffer from a range of psychological disorders. See Groth, *supra* note 1, at 318 ("One of the most basic observations that can be made about child offenders is that they are not all alike . . ."). For an alternative classification scheme which breaks sexual offenders into four different groups, see Jennifer M. Bund, Comment, *Did You Say Chemical Castration?*, 59 U. PITT. L. REV. 157, 161-62 (1997).

9. See AM. PSYCHIATRIC MANUAL, *supra* note 1, § 302.2, at 527-28 (defining pedophilia as "recurrent intense sexual arousing fantasies, sexual urges, or behaviors involving sexual activity with a pubescent child or children (generally age 13 years or younger)") (emphasis added). Child molestation is rarely an isolated event. See Bund, *supra* note 8, at 162-63 ("Recidivism rates for sex offenders are truly staggering . . . On average, an adolescent sex offender may be expected to commit up to 380 sex crimes during his lifetime, despite incarceration, and studies have revealed recidivism rates as high as eighty percent."); see also Beth Wilbourn, *Suffer the Children: Catholic Church Liability for the Sexual Abuse Acts of Priests*, 15 REV. LITIG. 251, 255 (1996). Statistics show that child molesters are likely to repeat their acts of sexual abuse. *Id.* at 257 n.26. See also ANN W. BURGESS ET AL., SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS 23 (1978) (stating that "[r]ecidivism is characteristic").

10. See Sopher, *supra* note 6, at 635-36 ("Child sexual abuse is extremely difficult to investigate. It is a crime of secrecy, with victims who are always unwilling, and often unable, to disclose what has happened."); see also L. Christine Brannon, *The Trauma of Testifying in Court for Child Victims of Sexual Assault v. The Accused's Right to Confrontation*, 18 L. & PSYCHOL. REV. 439, 444 (1994) (citing fear of not being believed or being criticized, feelings of responsibility, guilt, shame, embarrassment, physical threats and bribery as reasons that children may be reluctant to allege sexual abuse); Michelle Ann Scott, *Self-Defense and the Child Parricide Defendant: Should Courts Make a Distinction Between the Battered Woman and the Battered Child?*, 44 DRAKE L. REV. 351, 363 (1996) (explaining that children may be reluctant to come forward and expose their abuse because they "have no choice, psychologically, but to attach

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feel safety in numbers. To the extent that one victim was willing to come forward and press charges, other victims might also come forward.¹¹

In time, I learned the prosecutor's office had adopted a "scorched earth" approach to finding additional victims. In addition to the on-going media coverage, the prosecutor had obtained a list of all the boys who had ever played soccer for the defendant. The police and members of the prosecutor's office were personally interviewing each boy, especially the "other player" allegedly named by the coach during the bathroom incident.¹² The search was on for more victims, more evidence, and more charges. I held my breath and wondered if I hadn't made a mistake in agreeing to represent the defendant. I had visions—make that nightmares—of dozens of traumatized kids coming forward and pressing charges against the defendant.

As the weeks dragged on into months, however, there were no new victims, no new evidence, and no new charges. On the contrary, some of the players' parents formed a support group for the coach. They began to mount an informal grassroots campaign to discredit the initial charge. The tide appeared to be turning. The prosecutor had but one complainant, and a reluctant one at that. The boy never wanted to go public with his story. During the ride home after dinner that night, the boy began to act strangely.¹³ His parents kept asking him

themselves and identify with those who care for them" (quoting PAUL A. MONES, *WHEN A CHILD KILLS* 37 (1991)). "Consequently, abused children develop the delusion that . . . [the trusted abuser is] actually good. Such children then assume blame for the abuse, rather than attributing it to the . . . [abuser]."). *Id.* Finally, "[m]ost abused children simply begin to find ways to adapt to the abusive environment." *Id.* at 363-64.

11. See Bob Datz, *Protecting Children is Never an Easy Job*, TELEGRAM & GAZETTE (Worcester, Mass.), Mar. 4, 1996, at B2 ("It's well-known that victims' revelation of long-secret abuse can liberate more victims from secrecy . . ."); see also, e.g., Gerard Russell, *No One Wanted to Think Worst of Children's "Friend,"* SUNDAY TELEGRAM (Worcester, Mass.), Feb. 18, 1996, at A1 (quoting state trooper Andrew Bzdel, who investigated the case, saying that there were "indications of many more victims," and that "the charges were only preliminary charges to get the case going").

12. For a discussion of the potential abuses that improper interviewing of potential child victims may lead to, see Rich Lowry, *Creating Victims: False Charges of Sexual Abuse of Children*, NAT'L REV., Dec. 5, 1994, at 66. The Article cites methods that investigators use when interviewing children that can lead to false charges of abuse, such as leading questions, rewards for saying "yes," peer pressure, negative comments about the accused, etc. See generally *State v. Michaels*, 642 A.2d 1372 (N.J. 1994); HOLLIDA WAKEFIELD & RALPH UNDERWAGER, *ACCUSATIONS OF CHILD SEXUAL ABUSE* (Charles C. Thomas ed., 1988); Lisa Manshel, *The Child Witness and the Presumption of Authenticity After State v. Michaels*, 28 SETON HALL L. REV. 685 (1995); John E. B. Myers, *A Decade of International Legal Reform Regarding Child Abuse Investigation and Litigation: Steps Toward a Child Witness Code*, 28 PAC. L.J. 169 (1996).

13. For a comprehensive review of behavior in children that might indicate sexual abuse, see KATHLEEN C. FALLER, *UNDERSTANDING CHILD SEXUAL MALTREATMENT* 20-37 (1990).

what was wrong until he broke down crying and told them the story. His parents took him to the police, which led to the charge. All along, however, the boy was very uncomfortable talking about the incident. His reluctance to testify grew with each passing week as no new victims came forward and the coach's support group grew.¹⁴

As is often true in child sexual abuse cases, there was no independent physical evidence corroborating the boy's claim.¹⁵ The trial would be little more than a "swearing match" between a nervous, embarrassed thirteen-year-old boy and Ziggy Brukenfeld, a successful, well-liked, prominent sports figure backed by a group of players' parents.¹⁶ If the jury were to acquit the defendant, such

14. Recantation in child sexual abuse cases is not uncommon. See Jan G. Ahrens, Note, *Recovered Memories: True or False? A Look at False Memory Syndrome*, 34 U. LOUISVILLE J. FAM. L. 379, 396 (1995-96) (acknowledging that false claims of sexual abuse are prevalent); Christopher J. Sinnott, Note, *When Defendant Becomes the Victim: A Child's Recantation as Newly Discovered Evidence*, 41 CLEV. ST. L. REV. 569, 579 (1993) (reporting that each year over 800,000 cases of child abuse are investigated, but over 65% of all reports are not grounded in fact); see also Teena Sorenson & Barbara Snow, *How Children Tell: The Process of Disclosure in Child Sexual Abuse*, 70 CHILD WELFARE 3, 14 (1991) (between 12 and 33% of children recant, but 93% later admit to the abuse); Jane Prendergast, *Recanting Charges of Abuse Controversial Kentucky Case Illustrates National Debate on Issue*, CINCINNATI ENQUIRER, May 1, 1994, at B1 (quoting a district attorney pursuing child molestation charges as saying that recanting is not uncommon but he still believed the events occurred); Ellen Warren, *Can You Take Kid's Word for It? Well, It Depends*, CHI. TRIB., Feb. 8, 1996, at 1N (reporting that one study confirmed 22% of children recant in sexual abuse cases, but over 90% of the recanters later admitted to the abuse).

15. See *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) ("Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there are often no witnesses except the victim."); Sara Sun Beale, Conference Paper, *Prior Similar Acts in Prosecutions for Rape and Child Sex Abuse*, 4 CRIM. L.F. 307, 317 (1993) (noting that in child sexual abuse cases "[t]he offenses virtually always occur in private and there is little, if any, corroborative physical evidence in most cases"); G. Russell Nuce, Comment, *Child Sexual Abuse: A New Decade for the Protection of Our Children?*, 39 EMORY L.J. 581, 582 n.5 (1990) (noting that child sexual abuse cases are rarely witnessed by anyone other than the victim) (citing Sol Gothard, *The Admissibility of Evidence in Child Sexual Abuse Cases*, 66 CHILD WELFARE 13, 13-14 (1987)).

16. See CRIMINAL DEFENSE TECHNIQUES § 78A.01(3) (Matthew Bender & Co. 1993) (stating that the "prosecution of child abuse often rests solely upon the child victim's testimony"); see also Lisa M. Segal, *The Admissibility of Uncharged Misconduct Evidence in Sex Offense Cases: New Federal Rules of Evidence Codify the Lustful Disposition Exceptions*, 29 SUFFOLK U. L. REV. 515, 515 (1995) ("Circumstantial evidence is especially prevalent in sexual assault and child molestation cases due to the isolated and secretive nature of these offenses."); Sopher, *supra* note 6, at 643-44 ("Sexual abuse almost invariably occurs in secret. The scarcity of physical evidence further hinders both detection and prosecution. . . . As a result, the only evidence usually comes from the child, whose ability to communicate effectively may be hampered by several factors.").

a verdict would implicitly label the boy a liar¹⁷—not in the eyes of a lawyer who understands the difficulty of meeting the “beyond a reasonable doubt” heightened burden of proof, but no doubt in the eyes of many lay people, and especially in the eyes of the boy’s peers. Even worse, in the eyes of some, the boy would not be just your ordinary liar, but a sick liar; for only a sick person could make up such a sick lie. From the boy’s perspective, an acquittal would only add insult to injury. The boy had little, if anything, to gain from a trial and much to lose.¹⁸

And frankly, compared to your typical child sexual abuse case, the matter was really rather tame—although I have to confess I feel uncomfortable comparing degrees of child sexual abuse and implying that any such conduct is acceptable.¹⁹ The boy himself had not been physically abused. Even accepting the boy’s version of what happened, at worst he had been verbally intimidated into touching a man’s penis. While such conduct, if it occurred, is clearly and unequivocally reprehensible, it doesn’t rank up there with the classic scenario of child sexual abuse where the child is subject to horrible acts usually involving the child’s genitalia and/or the abuser’s genitalia.²⁰

More importantly, the boy’s story simply didn’t make sense. Why would such a respected member of the community do such a thing in the bathroom of a public restaurant where anybody could have walked in at any moment, and with the boy’s parents waiting just outside?²¹ And the boy had specifically alleged that the coach had named another player who “did it” for the coach, and who did “other stuff, too.” Yet that “other player” expressly and emphatically denied that the coach had ever done anything to him or that he had done

17. Researchers have posited many reasons why children may fabricate incidents of abuse. See CRIMINAL DEFENSE TECHNIQUES, *supra* note 16, § 78A.02[1][a] (“It is generally undisputed that on occasion a child will tell a lie, or ‘fib,’ and that some children lie more than others. . . . Some of the common reasons why children lie include fear of telling the truth, fear of loss of status or acceptance in a peer group, fear of disappointing someone by telling the truth, or fear of punishment.”); see also Jay Mathews, *In California, a Question of Abuse: An Excess of Child Molestation Cases Brings Kern County’s Investigative Methods Under Fire*, WASH. POST, May 31, 1989, at D1 (discussing the overzealous investigative techniques in *Pitts v. Kern*, 57 Cal. Rptr. 2d. 471 (1996), which led to convictions of innocent defendants).

18. See BURGESS ET AL., *supra* note 9, at 205 (listing four reasons why a trial is traumatic for the child victim). A trial is traumatic for the child victim because (1) the child must relive the event; (2) the child is subject to cross-examination and doubt concerning his accusations; (3) the child may begin to feel betrayed by those thought to be supportive; (4) time is suspended as the justice system drags to a conclusion. See BURGESS ET AL., *supra* note 9, at 205.

19. Child abuse takes on many forms, from comments to voyeurism to touching to sexual contact. See FALLER, *supra* note 13, at 40 (Table 2.1).

20. See Faller, *supra* note 13, at 39-40.

21. There are many different motivating factors attributed to child molesters. See BURGESS ET AL., *supra* note 9, at 3-24. See generally *supra* notes 1, 8.

anything to the coach. If the boy were mistaken or lying about that, what else might the boy be mistaken or lying about? The prosecution had problems with its case. I slowly began to feel better about my decision to represent Ziggy.

Ziggy and I realized, however, that we had problems with our case as well. There are risks and costs inherent in any trial, especially the trial of a child sexual abuse charge.²² Ziggy was a middle aged, single white male who was starting to put on weight and who had never married. He was fairly average in appearance, except for his dark, bushy mustache. An immigrant from Germany, he still spoke with a heavy German accent. He worked as an executive chef for a local food service company, but his passion in life was the Kickers Soccer Club, which he started and built into one of the finest soccer organizations in the nation. The filing of the charge had received moderate publicity, but even that publicity had made it more difficult for Ziggy to recruit young boys to play soccer for him.²³ The parents group which had formed to support Ziggy had managed to offset some of the damage done by the charge, but any trial, with its detailed and prolonged examination of the allegations, would change that. Even if he were acquitted, the publicity surrounding the trial would effectively end his coaching career.²⁴

22. See generally RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* §§ 21.5, 21.7, 21.8 (4th ed. 1992); Rebecca Hollander-Blumoff, *Getting to "Guilty": Plea Bargaining as Negotiation*, 2 HARV. NEGOTIATION L. REV. 115 (1997); Bruce H. Kobayashi & John R. Lott, *In Defense of Criminal Expenditures and Plea Bargaining*, 16 INT'L REV. L. & ECON. 397 (1996); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992); Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121, 1176-77 (1998).

23. See CRIMINAL DEFENSE TECHNIQUES, *supra* note 16, § 78A.01[4] (stating that "[t]he damage to the defendant occurs at the time of filing, and involves a loss of reputation, expenses of defense, embarrassment and other repercussions, regardless of the truth of the complaint, and regardless of whether the prosecution is discontinued, dismissed for lack of evidence, or ends in acquittal"); see also *infra* note 24.

24. See Roy N. Howson, *Child Sexual Abuse Cases: Dangerous Trends and Possible Solutions*, THE CHAMPION, Aug. 1995, at 6, stating:

When an allegation of child sexual abuse is made against a man or a woman and the allegation becomes in any fashion public knowledge, the person begins to suffer immediate and serious consequences. From that moment on, the person will never be viewed in the same fashion by his or her friends, neighbors, or even loved ones. He or she will be shunned by other person in their community, especially those with small children. The person will begin to carry a stigma which is very likely to last a lifetime. The person will soon discover that there is no opportunity for true "vindication" within the criminal justice system. The best a person can hope for at trial is a finding of "not guilty." That finding is, of course, not a vindication for there is no plea and no verdict of "innocent" within our system.

Id. See also, e.g., Domeena C. Renshaw, M.D., *When Sex Abuse is Falsely Charged*, THE CHAMPION, Jan./Feb. 1986, at 8-9 (relating the story of a dentist who was arrested and falsely accused of sexual abuse by a 13 year old babysitter later described by her

And who knew what a jury might do when faced with the boy's testimony. While Ziggy maintained his innocence, he feared possible jury bias against him because of his strong foreign accent, because he was single, and because he spent so much time with young boys.²⁵ While the public hysteria over child sexual abuse might not be what it used to be,²⁶ there are still occasional news reports highlighting the shocking nature of child sexual abuse. If the jury were to believe the boy and convict Ziggy, the current public outrage over sexual offenses involving minors would undoubtedly mean that Ziggy would spend years in prison, despite the relatively tame nature of the alleged incident.²⁷

parents as a "pathological liar," the dentist was eventually acquitted, but could not continue to practice in the community as a result of the publicity, and his marriage broke up under the strain).

25. Commentators recognize the influence that such factors may have on juries. See Richard W. Cole & Laura Maslow-Armand, *The Role of the Counsel and Courts in Addressing Foreign Language and Cultural Barriers at Different Stages of a Criminal Proceeding*, 19 W. NEW ENG. L. REV. 193, 196 (1997) (stating that "[p]rejudicial misimpressions may result because a defendant fails to make eye contact with the police or jury, speaks in a voice unnaturally loud or soft, or appears without emotion"); Michael B. Shulman, *No Hablo Ingles: Court Interpretation as a Major Obstacle to Fairness for Non-English Speaking Defendants*, 46 VAND. L. REV. 175, 177 (1993) (noting that "[a]merican juries are often biased against non-English speaking defendants . . .").

26. See Andrew Vachss, *If We Really Want to Protect Our Children*, PARADE, Nov. 3, 1996, at 4 ("The stories of children who have been sexually abused, which once shocked us, have become almost commonplace in recent years."); see also Sopher, *supra* note 6, at 633-35 (discussing "the birth of both the battle against child sexual abuse and the backlash against that battle"). While socially the public hysteria over child sexual abuse might not be what it used to be, legally the hysteria arguably continues. On both the state and federal level, there have a number of reforms over the years to facilitate prosecution of accused child molesters: abolishing the competency test for child witnesses, mandatory reporting requirements, permitting child witnesses to testify through videotape or closed-circuit television, adoption of hearsay exceptions for a child's out-of-court statements, tolling the statute of limitations. See Durga M. Bharam, *Statute of Limitations for Child Sexual Abuse Offenses: A Time for Reform Utilizing the Discovery Rule*, 80 J. CRIM. L. & CRIMINOLOGY 842, 842-43 (1989). In addition, states have increased the punishment for child sexual abuse offenses and many now require sexual offenders to register. See, e.g., Karen Kay Harris, *General Provisions: Require Registration for Certain Offenders*, 13 GA. ST. U. L. REV. 257, 258 (1996) ("Other preventative measures under consideration include increased sentencing for first-time and repeat offenders, reversal of the trend toward early release for violent offenders, informing the public when convicted sex offenders are released, and sexual offender registration programs."); Stephen R. McAllister, *The Constitutionality of Kansas Law Targeting Sex Offenders*, 36 WASHBURN L. J. 419 (1997); see also *supra* note 6. Lastly, several states have gone so far as to add the possibility of chemical castration. See Bund, *supra* note 8.

27. See Sopher, *supra* note 6, at 635 n.13 ("Americans are at a fever pitch over child abuse these days . . . we're frantic to root it out and stomp it out.") (quoting Laura Shapiro et al., *Rush to Judgment*, NEWSWEEK, Apr. 19, 1993, at 54); see also Jerry

While the likelihood of the jury convicting Ziggy arguably was less than fifty-fifty, anything could happen.

As the matter wore on, and no new victims came forward, the prosecutor and I began "the dance of the plea bargain."²⁸ At first the prosecutor would have nothing to do with me. She believed the boy. She believed it was just a matter of time until more victims came forward, sealing my client's fate. She wanted to prosecute Ziggy to the full extent of the law. With time, however, she began to recognize the weaknesses in her case. Although the prosecutor had contacted all of the other boys who had played or were currently playing for the defendant, several hundred boys in all, no other complainant came forward. There were no other witnesses to the alleged incident. The prosecution had to admit that the case would come down to a "swearing match."²⁹ Even if the jury were to believe the boy, there was also the tough legal issue of whether the coach's repeated verbal requests that the boy touch his penis constituted "forcible compulsion" as required under the law.³⁰

While the prosecutor no doubt preferred an outright conviction to a plea bargained one,³¹ she preferred a plea bargained conviction to an acquittal.³²

Gillam, *California Laws '95*, L.A. TIMES, Jan. 2, 1995, at A3 (reporting new California laws that sanctions sentences ranging from 25 years to life for first-time child molesters); Harris, *supra* note 25. See generally *supra* note 6.

28. Plea bargaining is the waiver of the right to trial and the exchange of a guilty plea by the defendant for a promise of more lenient treatment than would be given him if convicted at trial. See Malcolm M. Feeley, *Plea Bargaining and the Structure of the Criminal Process*, 7 JUST. SYS. J. 338, n.1 (1982). "Most criminal prosecutions are settled without a trial." Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 909, 909 (1992). Although most legal scholars disapprove of plea bargaining as both inefficient and unjust, it has strong societal value in that it saves time and resources. See *id.* at 909, 913.

29. See Brannon, *supra* note 10, at 443 ("Child sexual abuse is a difficult crime to prosecute because there are usually no witnesses other than the child victim, and because the child victim and the accused frequently provide conflicting testimony."); see also *supra* note 16.

30. In setting the severity of the offense, one factor many states use to differentiate offenses is whether the victim was forced to commit the sexual act. For example, in Missouri, the crime of sexual abuse requires that the defendant "subject[] another person to sexual contact by the use of *forcible compulsion*." MO. REV. STAT. § 566.100.1 (1994) (emphasis added); see also CAL. PENAL CODE § 288(b)(1) (West 1998).

31. See Schulhofer, *supra* note 22, at 1987 (noting that a prosecutor will sometimes try a case that could be settled more efficiently in order to enhance his reputation in the community with a conviction); see also BNA CRIMINAL PRACTICE MANUAL, PLEA BARGAINING AND GUILTY PLEAS § 71:106 (1987) [hereinafter BNA CRIMINAL PRACTICE MANUAL] ("The prosecutor who is out to put a notch in his belt by winning a major case may be less apt to plead the case down. Political ambitions may militate against a plea offer in a case that has captured the eye of the media and the public.").

32. Schulhofer states:

The prosecutor's objective in each case is to obtain the optimum level of

After months of investigating and posturing by myself and the prosecution, during which time we alternated puffing the strengths of our respective positions and exaggerating the weaknesses in each other's cases, the prosecution finally pitched a plea: the defendant would plead guilty to sexual misconduct involving a minor, the lowest class felony.³³ Because the plea would be to a felony, Ziggy would have to register as a sexual offender, but he wouldn't have to serve any jail time; he would receive three years' probation—which would permit him to continue to coach the boys—conditioned on (1) another adult being present at all soccer practices, games, and team meetings, and (2) the defendant receiving psychiatric counseling.³⁴ I gave a deep sigh of relief.

punishment at the least cost, in order to free litigation resources for other prosecutions that can bring additional deterrence benefits. By tailoring each plea offer to the expected costs of trial, the likelihood of success, and the expected trial sentence, the prosecutor can maximize the deterrence obtainable from the finite resources at her disposal.

Schulhofer, *supra* note 22, at 1980. The prosecutor's motive in accepting a plea bargain, typically, is "to secure a conviction to eliminate the risk, time, and expense of litigation by getting the defendant to convict himself" with a guilty plea. SETTLEMENT AND PLEA BARGAINING 288 (ATLA Ed. Fund, 1981).

33. Under Missouri law:

1. A person commits the crime of sexual misconduct involving a child if the person:

(1) Knowingly exposes the person's genitals to a child less than fourteen years of age in a manner that would cause a reasonable adult to believe that the conduct is likely to cause affront or alarm to a child less than fourteen years of age;

(2) Knowingly exposes the person's genitals to a child less than fourteen years of age for the purpose of arousing or gratifying the sexual desire of any person, including the child; . . .

. . . .

3. Violation of this section is a class D felony

MO. REV. STAT. § 566.083 (Supp. 1998). Violation of a class D felony could result in imprisonment for up to 5 years. See MO. REV. STAT. § 558.011 (1994). At the time of *Missouri v. Muthofer*, 731 S.W.2d 504 (Mo. Ct. App. 1987), the offense of sexual misconduct involving a child did not exist. Missouri law did recognize, however, sexual abuse in the second degree, which constituted subjecting "another person to whom he is not married to sexual contact, when the other person is incapacitated or twelve or thirteen years old." MO. REV. STAT. § 566.110 (1977). Missouri classified sexual abuse in the second degree as a class A misdemeanor. *Id.* In *Muthofer*, the defendant pled guilty to sexual abuse in the second degree.

34. Ziggy's plea is not unusual. See Laura Lane, Note, *The Effects of the Abolition of the Corroboration Requirement in Child Sexual Assault Cases*, 36 CATH. U. L. REV. 793, 793 (1987) ("[I]t is estimated that approximately 90% of all child abuse cases across the country are never prosecuted."); see also Ross E. Cheit & Erica B. Goldschmidt, *Child Molesters in the Criminal Justice System: A Comprehensive Case-Flow Analysis of the Rhode Island Docket* (1985-1993), 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 267, 274 (1997) (finding that in a study based on Rhode Island statistics, over 86% of

The plea bargain had been my secret goal from the start of the case.³⁵ I figured there was no way the prosecution would drop the case, especially after all the publicity the indictment and on-going investigation had received,³⁶ but I wasn't particularly interested in defending the charge at trial. That would only increase the risk that I would be associated with a child molester, not exactly the reputation I wanted to start my career. How many clients want to be represented by an attorney who represents child molesters? Not even other criminal defendants want to be associated with child molesters, to say nothing of civil clients.³⁷

sexual abuse cases were plea-bargained); Sheila McCann & Ted Cilwick, *Sex Offenders: Does Hard Time Fit the Crime? Utah's Minimum-Mandatory Terms: Are They Used, Abused, or Useless?*, SALT LAKE TRIB., Apr. 16, 1995, at A1 (reporting that "[f]requently, sex offenders get off with probation or lenient prison terms instead of the minimum-mandatory sentences ordered by the 1983 Legislature"). Of 97 mandatory-minimum cases filed in Utah over a two year period, only nine offenders received the mandatory sentence. *See id.* At the time of the *Muthofer* case, sexual offenders were not required to register as sexual offenders as is typically the case today. *See* MO. REV. STAT. § 589.400 (Supp. 1998). *See generally* Stephen R. McAllister, *Megan's Laws: Wise Public Policy or Ill-Considered Public Folly*, 7 KAN. J. L. & PUB. POL'Y 1 (1998).

35. "One criticism that has been leveled at plea bargaining is that the bargaining system is deficient in identifying which defendants are guilty of the crimes charged and that, as a result, many innocent defendants plead guilty." Zacharias, *supra* note 22, at 1151. *See generally* Schulhofer, *supra* note 22 (discussing the "Innocence Problem," defendants who are truly innocent pleading guilty to avoid the negatives of trial and possible conviction). Proponents of plea bargaining assert that "plea bargaining insures prompt application of correctional measures; that it facilitates the trial of other offenders; that it minimizes unnecessary harm to the defendant from a public trial, and that it permits the defendant to accept responsibility for what he has done." BNA CRIMINAL PRACTICE MANUAL, *supra* note 31, § 71:102-103. Opponents assert that "prosecutors bargain just to move cases; that unfair discrimination occurs among similar offenders; that the resulting lenient sentences reduce the deterrent impact; that effective rehabilitation is impeded by curbing judicial sentencing options; and that innocent persons may be induced to plead guilty." BNA CRIMINAL PRACTICE MANUAL, *supra* note 31, § 71:102-103.

36. *See* Terese L. Fitzpatrick, Note, *Innocent Until Proven Guilty: Shallow Words for the Falsely Accused in a Criminal Prosecution for Child Sexual Abuse*, 12 U. BRIDGEPORT L. REV. 175, 199-200 (1991). Fitzpatrick states:

Although there is a desire to treat rather than prosecute the sexual abuser, a press created public hysteria often accelerates the decision to prosecute. . . . In bringing the information to the public, there is often an outcry for justice. The attitude becomes '[d]amn the defendant, full speed ahead.' Prosecutions go forward because of public pressure regardless of the sufficiency of the evidence.

Id. (quoting Lees-Haley, *Innocent Lies, Tragic Consequences: The Manipulation of Child Testimony*, TRIAL, Apr. 1988, at 37).

37. *See* CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, FED. PRAC. & PROC. EVID. § 5412 (Supp. 1998) (stating that, because the attitude of prisoners toward child

I kept reminding myself, however, that I had to put my own interests aside and think of my client's position. Going to trial meant he could be found guilty of a felony and sentenced to prison for years.³⁸ While the chance of being convicted were fifty-fifty at best,³⁹ the potential sentence and permanent stigma attached to the offense were imposing.⁴⁰ Even if acquitted, the adverse publicity associated with the trial would permanently scar Ziggy.⁴¹

In contrast to the uncertainty and bleak worst case scenario associated with going to trial, the plea bargain proposal appeared to offer Ziggy the opportunity to put this incident behind him with minimal adverse impact on his day-to-day life. Although he would have to plead guilty to a felony, he wouldn't have to serve any prison time.⁴² He could continue his ordinary activities with few

molesters resembles that of the general public, some courts and prosecutors are reluctant to send first-time offenders to prison for fear of what they might suffer at the hands of other inmates); Robert Re, *Even Other Criminals Ostracize Child Molesters*, THE RECORD (New Jersey), Sept. 5, 1994, at A-13 ("Most inmates have absolutely no tolerance for child molesters."); see also Phillip Witt & Thom Allena, *Developing Sentencing Plans for Child Molesters*, 159 PLI/CRIM. 669, 675 (1991) (stating that disgust, revulsion, and anger lead some legal and mental health professionals to refuse to accept child molesters as clients).

38. See *supra* note 6.

39. See Cheit & Goldschmidt, *supra* note 34, at 268 (noting that the nine-year statewide average conviction rate in Rhode Island is under 60% for first-degree molestation charges and under 30% for second-degree charges).

40. See Cheit & Goldschmidt, *supra* note 34, at 268 (noting that in Rhode Island, the average sentence for a first-degree molestation conviction is seven years; the average for a second-degree conviction is 3.8 years); see also Brian D. Gallagher, *Damages, Duress and the Discovery Rules: The Statutory Right of Recovery for Victims of Childhood Sexual Abuse*, 17 SETON HALL LEGIS. J. 505, 539 (1993) (stating that a person who has been convicted of child molestation will, in all probability, be completely ostracized from society).

41. See *supra* note 24 and accompanying text.

42. One writer asserts:

The plea bargain is not just about guilt or innocence. It is about saving time and money and is coercive in its essence unless the defendant fully understands what he is pleading to and what the expected outcomes are. If . . .

[the defendant] pleaded guilty and saved everyone the cost and effort of a trial, he would get probation. Case closed.

Angie O'Gorman, *Injustice in Immigration Law*, ST. LOUIS POST-DISPATCH, July 7, 1998, at B7. The defendant "may not understand the consequences of a conviction; he is likely to be most concerned about not going to jail. So, if . . . [the defendant] is told that he need only 'confess' and he can go home, that is precisely what he is likely to do." Alan D. Hornstein, *Between Rock and a Hard Place: The Right to Testify and Impeachment By Prior Conviction*, 42 VILL. L. REV. 1, 11 (1997). "While minimization of jail time immediately leaps to mind as a primary benefit of plea bargaining and thus a primary goal of the client, there is a myriad of other goals and concerns that may pertain." BNA CRIMINAL PRACTICE MANUAL, *supra* note 31, §71:103. The defense attorney needs to

restrictions. He would have to attend psychiatric counseling sessions, but he had a flexible enough schedule and enough financial resources that this wouldn't be any problem. As for the other condition of probation—that he couldn't coach the boys unless a parent was present at all times—the parents group which backed the coach agreed to coordinate parents to stay during the soccer practices and team meetings, so that wouldn't be a problem either. I would have preferred that Ziggy plead guilty to a misdemeanor, but the prosecutor refused to consider it. She wanted a felony on his record in case Ziggy got in trouble again in the future. The proposed plea bargain wasn't the best result, but assuming Ziggy stayed out of trouble, the prosecutor's proposal looked acceptable to me.⁴³

When I discussed the plea bargain proposal with Ziggy, we discussed the pros and cons of going to trial versus plea bargaining. In assessing his options, he seemed primarily interested in putting the matter behind him and getting on with the rest of his life. While Ziggy wanted to beat the charge, he didn't want to "win the battle but lose the war" if it meant losing the love of his life—the Kickers Soccer Club. In light of the minimal impact the plea would have upon his day-to-day activities, and the potentially devastating outcome if we went to trial, I recommended to Ziggy that he accept the prosecutor's proposal and plead guilty. He agreed with my recommendation and agreed to the plea bargain.

I felt good about the outcome. I believed that I had done my job, despite my initial dislike of the matter, and indirectly the client, because of the nature of the charge. I had successfully negotiated a plea bargain that not only kept Ziggy out of jail, but that permitted him to continue his life with minimal disruption.⁴⁴

keep the client's best interests in mind when counseling a plea bargain. See SETTLEMENT AND PLEA BARGAINING, *supra* note 32, at 289-91 (stating that the client should be counseled as to the "adverse consequences that invariably flow from plea bargaining").

43. See SETTLEMENT AND PLEA BARGAINING, *supra* note 32, at 295.

In order to negotiate effectively for the most favorable disposition, defense counsel must have comprehensive knowledge of the following factors:

1. The defendant's criminal liability, i.e., the nature of the charges, how they are regarded in the community, and whether the charges can be proved beyond a reasonable doubt.
2. The defendant's background, prior criminal record, and how the latter may be used to impeach the client if he were to testify.
3. The attitude and ability of the prosecutor.
4. The attitude of the judge and his reputation for sentencing.
5. Sentencing alternatives.
6. Collateral consequences of the plea.

SETTLEMENT AND PLEA BARGAINING, *supra* note 32, at 295.

44. See JAMES E. BOND, PLEA BARGAINING & GUILTY PLEAS §1.7 (CBC Ltd. 2d. ed. 1983) (discussing the inducements to plea bargaining, which are reduction or dismissal of charges, sentencing recommendations, or anything else that might mitigate punishment). A further interest unrelated to punishment is to minimize adverse publicity or avoid stigmatization as, for example, a child molester. See *id.* §1.7(f). See generally

I also felt good about the outcome because I believed it served the interests of the community as well. If Ziggy had actually committed the offense, the best thing to do would be to get him into treatment to insure, to the extent possible, that he would not do it again.⁴⁵ Obviously, incarcerating him would also insure that he would not do it again. If he were truly guilty, however, incarcerating him wouldn't cure him; it would only delay the next incident until he was released from jail.⁴⁶ The plea bargain, on the other hand, required psychiatric counseling

id. §4.9 (reviewing the services required of defense counsel in a plea bargain, basically that of evaluating the case).

45. The literature is split over the effectiveness of treatment programs for sex offenders. See Bund, *supra* note 8, at 161-62 (arguing that only certain types of sexual offenders respond to treatment); Arthur J. Lurigio et al., *Child Sexual Abuse: Its Causes, Consequences, and Implications For Probation Practice*, 59 SEP. FED. PROBATION 69 (1995); Witt & Allena, *supra* note 37, at 679 (arguing that emerging research on effective treatment plans for child molesters makes it "particularly important to include a treatment component to the sentencing plan"); cf. Peter Finn, *Do Sex Offender Treatment Programs Work?*, 78 JUDICATURE 250, 250 (1995) ("A review of the scientific literature and telephone interviews with more than a dozen treatment researchers and program administrators found little evidence that current approaches to treating sexual offenders are effective in reducing recidivism."); Groth, *supra* note 1, at 326 ("As yet, no single method of treatment or type of therapeutic intervention has proved to be a totally effective remedy [for all child molesters.]; Sopher, *supra* note 6, at 640 (noting that most therapists feel that involuntary treatment is ineffective and that some child advocates assert that "molesters can only be deterred, not rehabilitated") (citations omitted).

46. Research indicates that the typical child molester's offense is more the product of immaturity than malicious intent towards a particular child. See Groth, *supra* note 1, at 316. Punishment for the offense may only confirm the molester's perception of adults as hostile and punitive and reinforce his attraction to children. See Groth, *supra* note 1, at 317. Studies on recidivism rates among convicted child molesters, however, report conflicting results. The most frequently cited studies of sex offender recidivism indicate that offenders who molest young girls repeat their offense at a rate of 29%; offenders who molest young boys, at a rate of up to 40%. See Brief of United States as Amicus Curiae in Support of Petitioner, *Doe v. Portiz*, 662 A.2d 367 (N.J. 1995) (No. 39989), cited in 6 B.U. PUB. INT. L.J. 75, 80 (1996) [hereinafter Brief] (summarizing studies of recidivism rates among sex offenders). In a study of 197 convicted child molesters released from prison between 1958 and 1974, 42% were later convicted of subsequent sexual crimes. See Karl Hanson et al., *Long-Term Recidivism of Child Molesters*, 61 J. CONSULTING CLINIC PSYCHOL. 4, 646, 648 (1993). A 15-year follow-up study by the California Department of Justice of 1,362 sex offenders arrested in 1973 found that 19.7% were rearrested for a similar offense. See Brief, *supra*, at 79; see also Bund, *supra* note 8, at 162-63. Bund states:

Recidivism rates for sex offenders are truly staggering and suggest that incarceration is ineffective and neither deters nor rehabilitates sex offenders. On average, an adolescent sex offender may be expected to commit up to 380 sex crimes during his lifetime, despite incarceration, and studies have revealed recidivism rates as high as eighty percent.

and treatment that might cure him of his depraved urges, or at least teach him how to control them.⁴⁷ To the extent that he might be tempted to abuse one of his players again, requiring a parent to be present at all times during soccer practices, games, and team meetings made it virtually impossible for him to molest any of his players. And if he were to abuse another child sexually, he had a record now that would make it easier to put him away.⁴⁸

Lastly, I felt good about the plea bargain because it served the interests of the victim better than any of the alternatives.⁴⁹ Not that it's my responsibility, as defense counsel, to consider the interest of the victim, but I'm still human. I appreciated the pain and suffering the boy would have to endure if we tried the

Bund, *supra* note 8, at 162-63. Some commentators, however, have challenged the assertion that recidivism rates are extremely high among sex offenders and many proffer statistics showing rates comparable to those who have committed other offenses. See Mary Christine Hutton, *Commentary: Prior Bad Acts Evidence in Cases of Sexual Contact with a Child*, 34 S.D. L. REV. 604 (1989). Of course, undetected offenses may make recidivism rates much higher than studies indicate. See generally Bund, *supra* note 8, at 163 n.15 (noting that experts agree that many acts of child sexual abuse go unreported); Thomas J. Reed, *Reading Goal Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases*, 21 AM. J. CRIM. L. 127, 151 (1993) (citing a prison population study in which inmates reported many more pedophilic acts than their arrest and conviction records showed; pedophiles with prior child molestation convictions evidenced a greater likelihood of repeating the act than did first-time offenders).

47. See BURGESS ET AL., *supra* note 9, at 25-42 (regarding psychiatric treatment of the offender, four stages must be met for successful rehabilitation). First, the offender must acknowledge the wrongful act. Second, he must make restitution or receive a punishment. Third, he must become sensitized to situations and impulses that lead to his sexually abusive behavior. Fourth, the offender needs to find safe, legal and positive outlets for his sexual energy. See BURGESS ET AL., *supra* note 9, at 42.

48. For a discussion of the admissibility of prior convictions at trial, see *infra* notes 111-57 and accompanying text. Many states, including Missouri, provide for stiffer sentences for defendants with prior convictions. See, e.g., MO. REV. STAT. § 566.067 (1994), which classifies child molestation in the first degree as a Class C felony "unless the actor has previously been convicted of an offense under this chapter . . . in which case the crime is a Class B felony." Similarly, child molestation in the second degrees is bumped from a class A misdemeanor to a class D felony if the actor has been previously convicted of an offense under the chapter. See MO. REV. STAT. § 566.068 (1994).

49. For a discussion of the potentially negative impact on the child victim of testifying in court, see BURGESS ET AL., *supra* note 18; Brannon, *supra* note 10; Sopher, *supra* note 6, at 644 (stating that "testifying in court is an unpleasant experience for any witness, but it can be extremely traumatic for a child"); Nuce, *supra* note 15; cf. John E. B. Myers et al., *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony*, 28 PAC. L. J. 3, 73-76 (1996) (arguing that there is little research on the effect of testifying on children, that what research there is is inconclusive, and that there is evidence that testifying may even have a positive effect upon children).

case. As Ziggy's attorney, it would be my job to inflict much of that pain and suffering; not intentionally, mind you, but simply as part of the litigation process. I wasn't looking forward to cross-examining the boy. The plea bargain saved the boy (and admittedly me, to some degree) from the trauma (some might even say "the further abuse") of having to relive the incident by testifying in court;⁵⁰ it saved him from the embarrassment he would no doubt feel from having to discuss the incident publicly; and it saved him from the potentially devastating blow if the jury were to acquit the defendant.⁵¹

My hope was that, under the circumstances, justice had been served. The terms of probation insured that the community was adequately protected. Ziggy could put this matter to rest and move on with his life as long as he stayed out of trouble. I had done my job by getting him a second chance. If he blew it by getting into trouble again, that would be his problem, not mine. The criminal justice system and I could give him the benefit of the doubt on the first charge, but what were the chances of two spurious charges of child sexual abuse being

50. "Child victims of sexual assault are particularly prone to suffering emotional distress from testifying in the presence of their alleged abusers." Brannon, *supra* note 10, at 442. "The number of times a child must repeat her story is one of the strongest predictors of trauma." Brannon, *supra* note 10, at 441-42. See also Sopher, *supra* note 6, at 637 (stating that "criminal prosecution . . . may carry a significant emotional cost for the child witness"). See generally Richard Ginkowski, *The Abused Child: The Prosecutor's Terrifying Nightmare*, CRIM. J., Spring 1986, at 30-35, 45 (discussing strategies for reducing the trauma children experience when testifying against their abusers). Courts, however, are increasingly providing protections for children testifying to incidents of abuse. In *Maryland v. Craig*, 497 U.S. 836 (1990), and *Idaho v. Wright*, 497 U.S. 805 (1990), the Supreme Court upheld the validity of state statutes allowing children to testify via one-way closed-circuit television. The court ruled that such a procedure does not violate a defendant's Sixth Amendment right to confrontation of his accuser if the state makes an adequate, fact-sensitive showing that the defendant's presence would traumatize the child witness. See *Craig*, 497 U.S. at 855-56.

51. "After going through the trauma of testifying, a child victim can be especially devastated by an acquittal for the defendant. Children often do not understand why the [judicial] process has not resulted in a just outcome." Rachel I. Wollitzer, *Sixth Amendment—Defendant's Right to Confront Witnesses: Constitutionality of Protective Measures in Child Sexual Assault Cases*, 79 J. CRIM. L. & CRIMINOLOGY 759, 786 (1988).

brought against the same person?⁵² I didn't want to think about it. Like Ziggy, I could put the matter behind me and move on. Or so I thought.

The call came a few months later. As soon as I heard his voice on the other end of the phone, my heart sank. I knew the only reason we would ever talk again was if Ziggy had been charged again. I was disappointed, so disappointed that I couldn't really concentrate on what he was saying. I heard the words, but I wasn't listening. My mind was preoccupied with what this call really meant. Like many attorneys, to fulfill my ethical duty to represent my client zealously, I have to believe that he is, or at least *might be*, innocent.⁵³ I had construed every ambiguous fact in Ziggy's favor. I had actually convinced myself that Ziggy probably hadn't committed the first offense. The facts were just too preposterous: a prominent, successful member of the community sexually molesting a boy in the restroom of a fairly crowded, public restaurant, with the victim's parents just outside in the dining area; and no other victims ever came forward, not even the one allegedly expressly identified. On the other hand, part of me always wondered why a thirteen-year-old boy would make up such a story.⁵⁴ It just didn't make sense. The plea bargain had relieved me of my moral

52. See 137 CONG. REC. S3240 (daily ed. Mar. 13, 1991) (sponsors of Federal Rules of Evidence 413-15 arguing that the occurrence of multiple false accusations is so "highly improbable" that evidence of past sexual offenses and accusations is more probative than prejudicial); cf. WRIGHT & GRAHAM, *supra* note 37, § 5412A (noting that, because child molesters are usually family members or people who for occupational or other reasons have contact with a number of related children, "accusations, true or false, are 'seldom generated independently of each other'"). Even the Justice Department, which sponsored the 1994 amendments to the Federal Evidence Code removing many of the barriers to admissibility of prior "bad acts" character evidence in sex abuse cases, conceded that the aforementioned fact reduces "the force of the argument from improbability." WRIGHT & GRAHAM, *supra* note 37, § 5412A.

53. See, e.g., ALAN M. DERSHOWITZ, *THE BEST DEFENSE* 117 (1982). Even when a lawyer cannot convince himself that his client is innocent, he must attempt to provide vigorous representation to the accused molester. See generally Thomas L. Heeney, *Coping With "The Abuse of Child Abuse Prosecutions: The Criminal Defense Lawyer's Viewpoint"*, *THE CHAMPION*, Aug. 1985, at 12 (discussing the criminal defense attorney's need to overlook his prejudice against clients accused of the morally repugnant crime of child sexual abuse).

54. Commentators and defense attorneys have proffered a number of reasons why children may fabricate incidents of abuse. See, e.g., Howson, *supra* note 24, at 6-11, 45 (stating that children may be encouraged to allege abuse by witnessing the affirmation other children receive in coming forward and noting that children do not necessarily know that child molestation is the great American taboo and are often unaware of the serious consequences of their allegations); Renshaw, M.D., *supra* note 24, at 8-10 (asserting that "children don't lie" is a myth; children are not born knowing right from wrong, they are suggestible and compliant, they can be taught to say things, they may not understand the consequences of their statements or acts, and memory of complex events is most subject to error upon recall).

duty of trying to resolve who was telling the truth. In light of the new charges, however, I had to confess it looked like I had been kidding myself.

As Ziggy told me about the new charges, all I could think was "where there is this much smoke there must be fire." He must have done it. But hey, I did my job; I got him a second chance. It was his own fault that he couldn't control his sexual proclivities. I didn't have any responsibility, legally or ethically, to continue to represent him.⁵⁵ When he finally got around to asking me if I would represent him, I told him I had to think it over. I didn't want to represent him, but I was too depressed to think of a polite way to say "no." I told him I would get back to him quickly so as not to prejudice his defense (like he was really going to have one). Funny, as I look back on the phone call, I think I was more disappointed in myself—in how wrong I had been in my assessment of the first charge—than I was about the fact that he had been charged again.

After I hung up and thought about what he had said, however, something bothered me. Something just didn't seem right. *Only five months* had passed since his plea bargained conviction, yet he had been charged with *25 new counts* of child molestation, all of a very serious and disgusting nature: *three counts of sodomy, fifteen counts of first-degree deviate sexual misconduct, and seven counts of second-degree deviate sexual abuse*. And the complainants were two boys on his soccer team. *How could that be?* The experience of sweating out the prior charge and the required psychological counseling were supposed to deter him from even thinking about sexually abusing children. Even if he were so inclined, requiring parents to be at the soccer practices, games, and team meetings was supposed to make it virtually impossible for him to abuse any of his players. How could he have abused these two players so many times in such little time? It appeared as if the prior plea bargained conviction and probationary terms not only failed to have their intended deterrent effect, they may have had the exact opposite effect.

Had the plea bargained conviction actually stimulated Ziggy into action? While possible, it seemed so contrary to my assumptions about human

55. An attorney does have, however, certain ethical obligations to continue to represent a client once a matter has begun. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b) (1997); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110 (1980). The initial representation of Ziggy in the matter of the initial charge had been completed. The second set of charges constituted a new matter. As a general rule, an attorney is not required to accept any particular client. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.2 cmt. (1997) ("A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified."); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-26 (1980) ("A lawyer is under no obligation to act as adviser or advocate for every person who may wish to become his client; but in furtherance of the objective of the bar to make legal services fully available, a lawyer should not lightly decline proffered employment.").

behavior—assumptions the criminal justice system shared⁵⁶—that I was puzzled. Then again, such assumptions are based on the premise that people act rationally. People who sexually molest children arguably are not rational actors to begin with, or if rational, are so sick that they cannot control themselves despite their better judgment.⁵⁷ Yet, I was still amazed at the number of charges, at the fact that the complainants were boys on his soccer team, and at how quickly Ziggy was purported to have committed the acts after his prior encounter with the law. Something seemed wrong. I decided to investigate a bit further before finalizing my decision not to represent Ziggy.

What I discovered still amazes me to this day. *All* of the new allegations of child sexual abuse *predated* the plea bargained conviction, and *all* of the new allegations were from boys who had *previously denied* that Ziggy had done anything to them! Apparently the prosecutor was not satisfied with Ziggy's plea bargained conviction. She was convinced Ziggy had abused some of the other boys. Even though the boys had denied that Ziggy did anything to them, she believed that some of them were simply too afraid and/or too embarrassed to tell the truth. She thought they might be more willing to come forward in light of the new development: Ziggy's plea bargained conviction.

Armed with the plea bargained conviction, the prosecutor went to work on some of the boys in an attempt to persuade them to come forward and press charges. She emphasized to the boys that they need not worry about whether people would believe them. She explained to the boys that, by plea bargaining, Ziggy had admitted he had sexually molested the boy.⁵⁸ Having admitted that he had done it before, Ziggy would have no credibility. People know that child molesters are sick people who don't molest just once—they molest repeatedly until caught. Everyone would believe the boys. More importantly, a jury would believe them.

56. See Sopher, *supra* note 6, at 641 (noting that if the criminal justice system is an effective deterrent [a contention beyond the scope of both Sopher's article and this one], "it follows that the threat of prosecution and conviction will deter potential child abusers"). See generally POSNER, *supra* note 22, §§ 7.1-2 (discussing the economic nature and function of criminal law and the optimal criminal sanctions).

57. See Groth, *supra* note 1, at 324 (asserting that "[j]ust as an alcoholic is not driven to drink out of thirst, a pedophile is not molesting children simply out of sexual desire," but instead is attempting to fix unresolved issues in his life through sexual activity that is all basically illusory; "the child will eventually mature and the offender must then find another victim"); see also FALLER, *supra* note 13, at 54-65 (discussing the psychology that causes an adult to sexually abuse children); cf. POSNER, *supra* note 22, § 7.2 (arguing that criminals are rational actors, "regardless of whether the crime is committed for pecuniary gain or out of passion").

58. "A guilty plea amounts to an admission of every element of the crime and is the equivalent of a conviction." *People v. Ward*, 426 P.2d 881, 883 (Cal. 1967). "[T]he guilty plea constitutes a conviction every bit as valid as one following a finding of guilt at trial." BOND, *supra* note 44, §1.5(a). See also Ray Hasu & Patrick Curran, *Guilty Pleas*, 85 GEO. L. J. 1136, 1144-45 (1997).

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The prosecutor also explained to the boys the legal significance of Ziggy's conviction. She explained the different ways she could use the plea bargained conviction at trial. She could use his conviction to help prove that he committed any new allegations.⁵⁹ Ziggy fit the profile of a child molester.⁶⁰ Through his soccer club activities, he had positioned himself to insure ready access to a continuous supply of young, vulnerable boys. The prosecution could combine the evidence of Ziggy's prior plea bargained conviction with the testimony of the boys to establish Ziggy's "*modus operandi*,"⁶¹ his pattern and practice of preying on young boys who played soccer for him. In addition, if Ziggy took the stand to try to rebut the boys' allegations, the prosecutor could use the plea bargained conviction to discredit him with the jury.⁶² Once the jury learned that Ziggy had already been convicted of sexual misconduct involving a minor, he would have no credibility.⁶³ The jury would believe the boys over the self-

59. See generally Margaret C. Livnah, *Branding the Sexual Predator: Constitutional Ramifications of Federal Rules of Evidence 413 through 415*, 44 CLEV. ST. L. REV. 169 (1996) (discussing the newly passed Federal Rules of Evidence that allow evidence of prior convictions of sexual abuse to be used against the accused at trial). But see Segal, *supra* note 16, at 515 (criticizing the exception that allows prior sex crime evidence at trial because it violates due process). See also *infra* notes 111-49 and accompanying text.

60. Ziggy fits the common perception of the profile of a child molester. See BURGESS ET AL., *supra* note 9, at 4. But cf. Groth, *supra* note 1, at 316 (stating that no particular traits distinguish the child molester from the general population). Clinical psychologists lump child molesters into two very broad categories. See Groth, *supra* note 1, at 318. The "fixated" molester often exhibits a compulsive attraction to and fixation upon children and is typically in a marriage of convenience, has poor socio-sexual peer relationships, and identifies closely with his victim. See Groth, *supra* note 1, at 319. The "regressed" molester's sexual involvement with a child constitutes a temporary or permanent departure from his more characteristic attraction to age mates and is usually married or common-law, has a more traditional lifestyle but underdeveloped peer relationships. See Groth, *supra* note 1, at 321. The fixated molester usually targets boys, while the regressed molester typically prefers girls. See Groth, *supra* note 1, at 319; see also Bund, *supra* note 8 (discussing four different types of sexual offenders).

61. *Modus operandi* means "[the] characteristic method employed by defendant in performance of repeated criminal acts." BARRON'S LAW DICTIONARY 306 (3d ed. 1991).

62. See FED. R. EVID. 609(a) ("For the purpose of attacking the credibility of a witness, (1) evidence that the witness . . . has been convicted of a crime shall be admitted . . .").

63. See Edward J. Imwinkelried, *Undertaking the Task of Reforming the American Character Evidence Prohibition: The Importance of Getting the Experiment Off on the Right Foot*, 22 FORDHAM URB. L. J. 285, 296 (1995). Imwinkelried states:

The risk of misdecision is greatest when the jury is likely to find the character evidence of the accused's uncharged misconduct repugnant or revolting. The admission of testimony about that type of misconduct can poison the juror's

serving testimony of a convicted child molester. The prosecutor spent hours, days, weeks, gaining the confidence of those boys she most suspected had been victims of Ziggy's alleged sexual misconduct.

After months of talking, explaining, and cajoling, three of the boys came forward to press charges against Ziggy. Although all three had previously denied that Ziggy had done anything to them, they recanted their earlier denials. The boys now charged that they had been the victims of repeated, heinous acts of deviant sexual abuse at the hands of Ziggy. The statute of limitations had run on one of the boys' allegations,⁶⁴ so all of the new charges arose from just two

minds and generate an overmastering hostility against the accused.

Evidence of sexual misconduct or child molestation by an accused has an extraordinary tendency to create such hostility. Certain categories of sex offenders, notably those who prey on young children, are considered veritable monsters. One federal court stated that the possibility of hostility is "somewhat heightened" in such cases. For its part, the Washington Supreme Court has observed that "the potential for prejudice is at its highest" "in sex cases."

The available empirical studies confirm that observation. The most famous study of the behavior patterns of American jurors is the Chicago Jury Project, described in the classic text, *The American Jury* by Kalven and Zeisel. One of the questions that the Chicago researchers investigated was the jurors' reaction to various types of offenses. The researchers specifically commented on the potential for prejudice in sex offense prosecutions. According to the researchers, many jurors found such conduct "reprehensible" and became "outraged." Jurors were especially likely to find the conduct offensive when the victim was a young child. The researchers described the danger that jurors will have "no patience with . . . [legal] technicality" and will "override[] distinctions of the law" to find the accused guilty.

Subsequent studies have corroborated these early findings.

Id. (citations omitted). See also Hornstein, *supra* note 42, at 9. "The defendant having previously sinned, a jury may well conclude either that the defendant is more likely to have sinned on this occasion or that the defendant should be removed from society regardless of her guilt of the instant offense." Hornstein, *supra* note 42, at 9.

64. An individual may not be prosecuted for a crime after the applicable statute of limitations, which varies in each state, expires on that crime. "In criminal cases, a statute of limitation is an act of grace, a surrendering by sovereign of its right to prosecute." BLACK'S LAW DICTIONARY 927 (6th ed. 1991). In response to the public outcry against child sexual abuse, however, "the majority of states have modified their statute of limitations in order to preserve the rights of an alleged victim for a greater time period." See Joseph A. Spadaro, Comment, *An Elusive Search for the Truth: The Admissibility of Repressed and Recovered Memories in Light of Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 30 CONN. L. REV. 1147, 1151 (1998). For example, the Missouri statute of limitations for child sexual abuse has been amended recently to run for either five years after the victim reaches age 18 or for three years after the victim discovers or reasonably should have discovered that injury or illness was caused by the alleged sexual abuse, whichever is longer. See MO. REV. STAT. § 537.046 (1994); see also, e.g., Dari S. Schwartz, *Child Abuse Reforms Within the Criminal Justice System*, 31 AUG.

of the boys. The prosecutor had that "I told you so" air about her. Interestingly, the boy who was allegedly expressly identified by Ziggy in the original bathroom incident continued to maintain that Ziggy never did anything to him.

The second set of charges against Ziggy just didn't seem right. There was no evidence Ziggy had caused any trouble since the plea bargained conviction. It had, apparently, served its purpose.⁶⁵ He had complied with its terms and stayed out of trouble. Instead of the plea bargain permitting him to put his troubles behind him,⁶⁶ however, it had created new troubles, resurrecting them from his past. Instead of getting a new chance, the plea bargained conviction may have deprived him of his only chance. I could not believe it. His plea bargained conviction to a relatively minor incident, but one involving sexual misconduct, had come back to haunt him many times worse than either of us had ever imagined.

As expected, the press jumped all over the second set of charges. The story was the lead story on the evening news and on the front page of the next day's newspapers.⁶⁷ Unlike the first charge, however, the story had a very short media life. The prosecutor had enough victims and enough charges. There was no need for on-going publicity.⁶⁸ If there were any other victims out there interested in coming forward, she would be happy to hear from them, but she didn't need them. The numbers were already on her side. She called off the search for more victims.

I knew, however, that there would be more publicity before the case was over—lots more. For not long after the second set of charges was filed, *the* District Attorney, "Buzz" Wright, announced that he personally was going to try the case. Buzz was a "law and order," no-nonsense kind of guy. He hadn't tried a case in years, but elections were coming up and what better campaign publicity could there be for a D.A. than putting away a "sicko" who sexually abuses children.⁶⁹ There were even rumors that he was growing tired of being D.A. and was thinking of running for County Supervisor. He needed a "high-profile" case that would generate "high-profile" campaign publicity. He started posturing

PROSECUTOR 31 (1997) (discussing the statute of limitations reforms in New York State that were enacted to accommodate child sexual abuse claims).

65. See *supra* note 56.

66. A defendant plea bargains in order to "minimize incarceration, loss of reputation, and damage to his personal affairs." See Zacharias, *supra* note 22, at 1132.

67. In *Missouri v. Muthofer*, 731 S.W.2d 504 (Mo. Ct. App. 1987), which occurred in St. Louis, Missouri, the story of the second set of charges was not only local news but regional news. See *Soccer Club Head Faces Sex Charges*, CHIC. TRIB., June 22, 1985, at 3C.

68. See *supra* note 7 and accompanying text.

69. See Michael Kinsley, *Civic Virtuosity and Child-Abuse Chic*, THE CHAMPION, Jan./Feb. 1986, at 7. "Child abuse is one of those issue politician love because it is so utterly uncontroversial. No one's for it. . . . For politicians, for the media, for the citizenry, issues like child abuse serve as a substitute for serious politics." *Id.*

early on, ranting and raving in the press that "if you molest our children, you will pay a heavy price." It didn't look good. Somewhere off in the distance I thought I heard the sound of a diesel locomotive starting up. It sure looked like somebody was getting railroaded.⁷⁰

On the face of it, the second set of charges appeared unfair. Ziggy pled guilty to the first charge because he and I had assumed, reasonably I might add, that in so doing he could put an end to the matter quickly, quietly, and with minimal adverse consequences. We knew the scope of the initial investigation. We knew the police and prosecutors had questioned all the boys who had ever played soccer for him. While it was conceivable that Ziggy could have molested other boys, the most likely victims were boys who had played for him over the years, boys who had spent countless hours under his exclusive supervision, both on and off the field. We knew that none of the players had indicated that Ziggy had done anything inappropriate to them. Since the prosecution's thorough investigation following the initial charge had failed to produce any additional charges, Ziggy seemed justified in believing that by pleading guilty he was putting all of this behind him. If either of us had known that more players were going to come forward, we would never have plea bargained the first charge. If we could have, we would have withdrawn the plea, but it was too late.⁷¹

70. See BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 6.2 (1997) [hereinafter PROSECUTORIAL MISCONDUCT]. "Extrajudicial statements to the media provide a powerful prosecutorial weapon to prejudice a defendant's right to fair trial. Prosecutors have been condemned . . . for utilizing the vehicle of the 'press conference' to celebrate with considerable fanfare a defendant's indictment." *Id.* Prosecutors should not comment on the nature of the crime with which the defendant is accused as that would unfairly prejudice the defendant. Such comments include remarks about the heinousness of the crime or that it is the "tip of the iceberg." See *id.* § 6.2(c).

71. Under certain circumstances, a defendant may be allowed to withdraw a guilty plea. The motion to withdraw, however, should be made before the sentence is imposed. After the sentence has been imposed, in some jurisdictions a defendant may move to withdraw a guilty plea, but such motions are granted in rare, extreme cases only "to correct a manifest injustice." See 2 WHARTON'S CRIMINAL PROCEDURE § 313, at 421-33 (Charles E. Torcia rev. 13th ed. 1990). Although "manifest injustice" is not self-defining, many statutes give some parameters to the doctrine by expressly providing that withdrawal should be granted if:

(A) the defendant was denied the effective assistance of counsel guaranteed by constitution, statute, or rule;

(B) the plea was not entered or ratified by the defendant or a person authorized to so act in the defendant's behalf;

(C) the plea was involuntary, or was entered without knowledge of the charge or knowledge that the sentence actually imposed could be imposed;

(D) the defendant did not receive the charge or sentence concessions contemplated by the plea agreement and the prosecuting attorney failed to seek or not to oppose these concessions as promised in the plea agreement;

(E) the defendant did not receive the charge or sentence concessions contemplated by the plea agreement, which was either tentatively or fully

"We?" I'm not sure when it became "we," or even why. Maybe it was because I didn't think it was fair the way the second set of charges had been brought. Maybe it was because I didn't like the way Ziggy's case was being manipulated to advance the political career of the D.A.⁷² Maybe it was because I felt somewhat at fault for Ziggy's predicament. After all, I had recommended the plea bargain to him. Although I had advised him of the possible consequences of the plea bargained conviction if he got in trouble again,⁷³ I had assumed, just as no doubt he had, that "if he got into trouble again" meant trouble based upon his future conduct, not any alleged past actions. It never dawned on me that plea bargaining the one charge would actually increase the risk that he would have more charges brought against him. For the first time since meeting Ziggy, I felt that *he* was being wronged, that *he* was the *victim*.

My initial reaction was that the boys should be estopped from changing their story.⁷⁴ By entering into the plea bargain, Ziggy had changed his position

concurred in by the court, and the defendant did not affirm the plea after being advised that the court no longer concurred and after being called upon to either affirm or withdraw the plea; or

(F) the guilty plea was entered upon the express condition, approved by the judge, that the plea could be withdrawn if the charge or sentence concessions were subsequently rejected by the court.

Id. See WAYNER R. LAFAVE & JEROLD H. ISRAEL, 2 CRIMINAL PROCEDURE § 20.5, at 661 (1984). A defendant typically is advised that a plea bargained conviction can be used against the defendant in subsequent criminal cases brought against the defendant. See SETTLEMENT AND PLEA BARGAINING, *supra* note 31, at 288; see also *infra* note 73. The defendant's failure to appreciate fully the state's right to use a plea bargained conviction against the defendant in any subsequent criminal case is unlikely to constitute "manifest injustice." The defendant's failure to appreciate that subsequent charges may be based upon facts which pre-date the plea bargained conviction are likely unlikely to constitute "manifest injustice."

72. See PROSECUTORIAL MISCONDUCT, *supra* note 70, § 6.1 ("The prosecutor has a dual obligation in dealing with the media. He must inform the public about pending cases, but he must not make a statement that would prevent a fair trial for the defendant, or manipulate the press for his own personal reasons.").

73. In plea bargaining, the defense lawyer should advise his client, with complete candor, as to the probable outcome of the case and the resulting effect of a plea on the defendant's life. See BNA CRIMINAL PRACTICE MANUAL, *supra* note 31, § 71:109-112.

74. Under the theory of estoppel *in pais*:

A person may be precluded by his act or conduct, or silence when it is his duty to speak, from asserting a right which he otherwise would have had. The doctrine rests upon principle that when a person by his acts causes another to change his condition to his detriment, person performing such acts is precluded from asserting a right which he otherwise might have had.

BLACK'S LAW DICTIONARY 551 (6th ed. 1991). "The vital principle of equitable estoppel is that a person who by his language or conduct leads another to do what he would not otherwise have done may not subject such person to loss or injury by disappointing the expectations on which he acted." 31 C.J.S. *Estoppel and Waiver* § 63 (1955). The

in reliance on the boys' denials. While my gut argued estoppel, my mind said "yeah, right." Criminal estoppel is a questionable doctrine to begin with, and it certainly doesn't apply to complainants, particularly victims of child sexual abuse.⁷⁵ Victims of child sexual abuse typically are young, scared, and embarrassed. They suppress and sometimes even repress what has happened to them.⁷⁶ In an attempt to get over the trauma of the abuse, they might even try to deny to themselves that anything has happened.⁷⁷ They are the ultimate "reluctant complainants."⁷⁸ Just because a victim of child sexual abuse is too

principle of equitable estoppel, however, "will never be allowed or applied where it would be an instrument of, or operate as, a fraud, be against good conscience, work injustice, accomplish a wrong, or enforce an act which is against the law, or contrary to public policy." *Id.* at 425-26. Moreover, although the actual definition of equitable estoppel is rather loose due to its equitable nature, the traditional elements of equitable estoppel require the truth of the matter asserted must be unknown to the party asserting estoppel. See 2 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 805, at 1644 (4th ed. 1918).

75. Criminal estoppel applies "when an authorized government official tells the defendant that certain conduct is legal and the defendant believes the official." *United States v. Brebner*, 951 F.2d 1017, 1024 (9th Cir. 1991). "The purpose of criminal estoppel is the protection of those whom the government has confused as to the state of the law. . . ." See Michael G. Egger, Comment, *Applying Estoppel Principles in Criminal Cases*, 78 YALE L.J. 1046, 1058 (1969). See generally Sean Connelly, *Bad Advice: The Entrapment By Estoppel Doctrine in Criminal Law*, 48 U. MIAMI L. REV. 627 (1994). Criminal estoppel, however, is never a valid defense for a heinous crime. See Egger, *supra*, at 1060-61.

76. Repressed Memory Syndrome, a subcategory of Post Traumatic Stress Disorder, is a psychological coping mechanism which allows many victims of child sexual abuse to repress memories of the abuse from their consciousness. See James Wilson Harshaw III, Comment, *Not Enough Time?: The Constitutionality of Short Statutes of Limitations for Civil Child Sexual Abuse Litigation*, 50 OHIO ST. L.J. 753, 756 (1989). Children bury memories in an attempt to disassociate themselves from the traumatic event. See Neomi Berkowitz, Note, *Balancing the Statute of Limitations and Discovery the Rule: Some Victims of Incestuous Abuse are Denied Access to Washington Courts* — *Tisane v. Tisane*, 10 U. PUGET SOUND L. REV. 721, 723 (1987). "[S]tudies show that from 18 to 59 percent of sexual-abuse victims repress memories for a period of time." Miriam Horn, *Memories Lost and Found*, U.S. NEWS & WORLD REP., Nov. 29, 1993, at 56.

77. See E. Sue Blume, *The Walking Wounded: Post-Incest Syndrome*, 15 SIECUS REP. 1, 5 (1986) (asserting that "[m]any, if not most, survivors of child sexual abuse develop amnesia that is so complete that they simply do not remember that they were abused at all; or . . . they minimize or deny the effects of the abuse so completely that they cannot later associate it with any consequences"). See generally *supra* note 76.

78. Most victims of sexual abuse do not press charges against their abuser. See John H. Arnold, *Clergy Sexual Malpractice*, 8 U. FLA. J.L. & PUB. POLICY 25, 26 (1991); see also *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) ("Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim. A child's feelings of vulnerability and guilt and his or her

immature and/or too scared to come forward and happens to deny that anything was done to him or her, he or she shouldn't be barred from later bringing charges against the perverts who perpetrate these monstrous crimes. As it is, it's hard enough getting victims of child sexual abuse to come forward and press charges.⁷⁹

Besides, as a technical matter, it is the State which brings the charges, not the kids. The State never said it would not bring additional charges. At best, the defendant in such a situation is claiming some weird "derivative estoppel," or "third-party beneficiary estoppel."⁸⁰ The State, however, is not required to bring all of its charges at the same time even if it knows of additional charges.⁸¹ Hell, if the cops in the Rodney King case could be tried twice for the same incident,⁸²

unwillingness to come forward are particularly acute when the abuser is a parent."). The number of unreported cases of child sexual abuse is substantial, as young victims are only half as likely as the general population to report crimes to the police. See Mary A. Rittershaus, Note, Maryland v. Craig: *Balancing the Interests of a Child Victim Against the Defendant's Right to Confront his Accuser*, 36 S.D. L. REV. 104 (1991); see also Bund, *supra* note 8, at 161 n.15 (noting that most experts agree that "the reporting of child sexual abuse incidents probably underestimates the extent of abuse").

79. See *supra* notes 10, 15, 76-78 and accompanying text.

80. See *supra* note 75 and accompanying text (discussing the application of estoppel in criminal cases). The doctrine of third-party beneficiary applies when a contract between two parties benefits a third party. See BLACK'S LAW DICTIONARY 1480 (6th ed. 1991) (defining a third party beneficiary as "one for whose benefit a promise is made in a contract, but who is not a party to the contract"). To qualify as a third party beneficiary, however, the parties to the contract must intend to benefit the third party by performance on the contract. See *id.*

81. Because of the potential prejudicial effect of multiple charges, the Federal Rules of Criminal Procedure restrict the state's ability to prosecute multiple charges in one trial even when the state may want to. See FED. R. CRIM. PROC. 8, 14. There is no requirement that the state bring all possible charges at the same time. In the plea bargaining context, however, the prosecutor may have a duty to inform the defendant of additional charges pending against him. See PROSECUTORIAL MISCONDUCT, *supra* note 70, § 7.3(a) (stating that the "'prosecutors' failure to disclose other ongoing criminal investigations involving the defendant may taint the plea"). But cf. *infra* note 92. The Supreme Court has held that the Fifth Amendment will not protect a defendant against consecutive prosecutions if "requires each offense charged in a plea bargain or trial proceeding proof of a different element." See Blockburger v. United States, 284 U.S. 299, 304 (1932). Many states provide by either statute or state constitution some protection against consecutive prosecutions beyond the minimum requirements of federal double jeopardy law. See Daniel C. Richman, *Bargaining About Future Jeopardy*, 49 VAND. L. REV. 1181, 1189 (1996).

82. The Double Jeopardy Clause of the Fifth Amendment commands that no person shall "be subject for the same offense to be twice put in jeopardy of life and limb." U.S. CONST. amend. V. Following the Rodney King incident, four Los Angeles police officers were acquitted in state court prosecutions of any wrongdoing in the apprehension and arrest of Rodney King. These same four officers were then held to

what were the chances the state could be estopped from trying Ziggy for different incidents? While my gut felt it was unfair to let these kids change their stories, legally there weren't grounds to dismiss the charges.

While I couldn't use the fact that the kids had previously denied that Ziggy had abused them to get the charges dismissed, I could use their prior inconsistent statements at trial to impeach their credibility.⁸³ The more I thought about it, however, the more I realized that wasn't going to do me much good either, absent more information. The jury would understand why victims of child sexual abuse are afraid and reluctant to come forward, why they might even initially deny that they were victims.⁸⁴ For the jury to dismiss the testimony of such victims just because they recanted their initial denials would be too harsh

stand trial at the federal level for violation of Mr. King's civil rights. See *United States v. Powell*, 34 F.3d 1416 (9th Cir. 1994). This was permissible under the Supreme Court's dual sovereignty doctrine, which provides that two different governments' laws cannot, by definition, describe the "same offense." See, e.g., *United States v. Lanza*, 260 U.S. 377, 382 (1992) (upholding multiple prosecutions by the state and federal government); *Heath v. Alabama*, 474 U.S. 82, 93 (1985) (upholding death sentence in Alabama after guilty plea in Georgia for same murder). This doctrine defeats the officers' double jeopardy claims because the first trial was for state law crimes, while the second prosecution was for federal law crimes. See Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1 (1995). Double jeopardy ordinarily attaches upon the court's acceptance of a plea agreement. See *Fransaw v. Lynaugh*, 810 F.2d 518, 523 (5th Cir.), cert. denied, 483 U.S. 1008 (1987); *United States v. Vaughan*, 715 F.2d 1373, 1378 n.2 (9th Cir. 1983). It is considered normal prosecutorial discretion for the prosecuting attorney to proceed with a second case if he feels that an inadequate result was obtained in the first trial. "A setting that involves the conduct of two independent sovereigns does not lend itself to the concept of vindictive prosecution." *United States v. Ng*, 699 F.2d 63, 68 (2d Cir. 1983).

83. See FED. R. EVID. 613 (allowing for the use of prior inconsistent statements to impeach a witness' credibility). Similarly, prosecutors may impeach their own child witnesses with the introduction of prior inconsistent statements. See, e.g., *State v. Hoofrin*, 476 So. 2d 481, 488 (La. Ct. App. 1985) (permitting the prosecutor to impeach a child witness who recants on the stand). Regardless of which side does the impeaching, the impact of impeaching a child through inconsistent statements is often reduced when courts allow expert "rehabilitative" testimony to explain weaknesses in the child's testimony, including inconsistencies and recantations. See Sopher, *supra* note 6, at 651-52.

84. See FALLER, *supra* note 13, at 117. Children are reluctant to talk about sexual abuse because (1) the abuser has warned them not to tell or risk the dire consequences; (2) the child is worried about what other will think of them for being victims; and (3) many children feel responsible for the abuse as if they caused it to happen by doing something wrong. See FALLER, *supra* note 13, at 117; see also, e.g., Roland Summit, *No One Invented McMartin 'Secret,'* L.A. TIMES, Feb. 5, 1986, at 5 ("Children who have been molested are typically ashamed, fearful and specifically forbidden to tell. . . . It is simply not normal for a child to tell, or for a parent to believe, that a solid citizen could be sexually dangerous."); *supra* notes 10, 18, 76-78.

a remedy. The jury wouldn't be swayed by the fact that the kids had reversed their stories.⁸⁵

No, the second set of charges appeared particularly unseemly not so much because the kids had changed their stories, but because of the way the prosecutor refused to accept the kids' initial denials of any wrongdoing and convinced them to change their stories. But while the prosecutor's conduct looked inappropriate, the real question was whether she had done anything illegal. Was it wrong for her to go back to the same kids who had initially denied that Ziggy had abused them? Did it constitute prosecutorial misconduct?⁸⁶

Although the prosecutor's conduct looked inappropriate, she was simply responding to the problem of the reluctant complainant in child sexual abuse cases. Victims of child sexual abuse are often too young, too scared, and/or too embarrassed to come forward and even *admit* that they were abused, to say nothing of coming forward and pressing charges.⁸⁷ When the initial single charge of child sexual abuse was filed against Ziggy, the prosecutor did all she could to find other victims and to convince them to come forward and join in the initial case. Although the prosecutor suspected that some of the boys who denied that Ziggy had abused them were lying, there was really nothing she could do. She had no choice but to go forward with the only charge she had at the time.⁸⁸ Should the fact that the State went forward with the single charge bar the prosecution from further investigating other possible charges against Ziggy? Clearly, such a broad principle would be unworkable. Should it bar the prosecution from going back to the same potential complainants who had already denied any wrongdoing? Again, while the prosecutor's actions looked

85. For a good discussion of the way jurors view narrative testimony, see Leslie Feiner, *The Whole Truth: Restoring Reality to Children's Narrative in Long-Term Incest Cases*, 87 J. CRIM. L. & CRIMINOLOGY 1385, 1412-21 (1997). Jurors will reject out of hand any narrative that does not comport with their knowledge and experience on the subject. *See id.* at 1413. If a child recants their story, that is one more inconsistency that must be explained to the jury. *See id.* at 1418-19. *But cf.* Sopher, *supra* note 6, at 651-52 (describing the use of expert testimony to mitigate against a child complainant's inconsistent statements). In fact, expert rehabilitative testimony can be so effective that some commentators have expressed a concern that the testimony will be used by jurors as substantive evidence against the accused. *See* John E.B. Myers et al., *Expert Testimony in Child Sexual Abuse Literature*, 68 NEB. L. REV. 1, 89-91 (1989).

86. Generally, prosecutorial misconduct during criminal investigations is limited to actions that violate the defendant's constitutional rights or constitute something "patently outrageous." *See* PROSECUTORIAL MISCONDUCT, *supra* note 70, § 1.1.

87. *See supra* notes 10, 14-15, 50, 78 and accompanying text.

88. Even if the prosecutor were inclined to wait longer to see if more complainants might come forward, the defendant's right to a speedy trial complicates the matter. *See* Steven Cordovani et al., *Timeliness of Prosecution: Speedy Trial*, 33 N.Y. JUR. 2D CRIM. L. § 1758 (1995) (noting that prosecution for child sexual abuse cases may be dismissed, especially upon reduction of charges from felony to misdemeanor, if the prosecution fails to indict within the statutorily required time period).

inappropriate at first blush, she was simply responding to the problem that victims of child sexual abuse are often reluctant to come forward and press charges.

To the extent the police investigators and prosecutor suspected there were other victims out there, they not only had the right, but also arguably the duty, to investigate further.⁸⁹ That their continued investigation might involve children who had already denied any abuse is understandable, and maybe even unavoidable. Barring the police and prosecution from going back and investigating further potential complainants who had initially denied any abuse would be, in essence, to apply criminal estoppel through the back door. Permitting child molesters to benefit from the youth, immaturity, and humiliation of their victims would be wrong. The police and prosecutors must have the right to continue to talk to potential victims even after the child initially denies that he or she has been abused, as long as their tactics are not excessive.⁹⁰

No, what was particularly unseemly about the prosecutor's actions here wasn't so much that she went back to the same kids who had previously denied any abuse, but that she used the plea bargained conviction to help convince the kids to recant their denials and press charges. Again, however, although unseemly, was the prosecution's use of the plea bargained conviction illegal? While it might look inappropriate, how could informing the kids of public information—the plea bargain—and explaining to them the likely legal consequences of the plea bargain, constitute misconduct? If the prosecutor had been motivated by vindictive or inappropriate motives, that might be grounds to claim prosecutorial misconduct;⁹¹ but there was no evidence that she was

89. See CRIME PREVENTION CENTER, OFFICE OF THE ATTORNEY GENERAL, CALIFORNIA DEPT. OF JUSTICE, CHILD ABUSE PREVENTION HANDBOOK 46-49 (1993) (detailing the duties of law enforcement officers to investigate allegations and suspicions of child abuse). In addition, while state guidelines differ, in many states child care providers, medical practitioners, and educators, law enforcement officials have a legal duty to at least report suspicions of child abuse. *Id.*

90. See *supra* note 12; *infra* notes 96-97.

91. "Defendants may move to dismiss indictments to remedy various types of government misconduct, including vindictive prosecution, prosecutorial misconduct in grand jury proceedings, or prosecutorial misconduct outside the indictment process, and unnecessary delay in presenting charges to the grand jury or in bringing the defendant to trial." Gregory C. Lisa & Richard R. Vecchiolla, *Indictments*, 83 GEO. L.J. 874, 876-78 (1995). In *Smith v. Phillips*, 455 U.S. 209 (1982), however, the Supreme Court held that "the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Id.* at 219. Thus, even if the police and prosecutors were driven to further investigation by impure motives, those motives are not in and of themselves punishable absent a showing that they resulted in an unfair trial. It is possible, however, for overzealous investigation to result in a finding of prosecutorial misconduct. In 1985, for example, seven defendants were convicted of molesting five children ages four through nine and were sentenced to one hundred years in prison each. See *People v. Pitts*, 223 Cal. App. 3d 606 (Ct. App. 1990), <https://scholarship.law.missouri.edu/mlr/vol64/iss2/2>

motivated by anything other than her suspicions that Ziggy had abused kids other than the initial lone complainant.

Although there was no evidence that the initial prosecutor was motivated by improper motives, I had my concerns about the way Buzz Wright, the D.A., jumped all over the second set of charges and appeared to be using the case as his re-election case.⁹² Might it have been that the prosecution intentionally held back a couple of complainants to set up the second, re-election case? Clearly there was the potential for prosecutorial abuse,⁹³ but unfortunately, no direct evidence of it. The police and prosecutor's office maintained that they were simply following up on their suspicions, investigating the most likely potential victims. As much as I hated to admit it, the prosecution had a legitimate interest in continuing to pursue the possibility that some of the other boys were simply reluctant complainants. In trying to get the boys to overcome their reluctance, the prosecution had a right to tell the boys what they could expect in terms of public reaction and a subsequent trial if they were to come forward.⁹⁴

opinion superseded by Pitts v. County of Kern, 930 P.2d 400 (Cal. 1997), *rev'd*, 949 P.2d 920 (Cal. 1998). In 1990, the convictions were overturned on the grounds of "prosecutorial misconduct" by the prosecutors and trial judge. *See id.* The finding was supported by an 80-page report by the California Attorney General's office concluding that a child sexual abuse coordinator and sheriff's deputies had over-interviewed and pressured child witnesses, assuming that everything the children said was true. *See Mathews, supra* note 17, at D1.

92. *See supra* notes 31, 69-72 and accompanying text; *see also* Hornstein, *supra* note 42, at 11 n.56 ("It is . . . conceivable that a conviction-hungry prosecutor would tend more readily to bring a weak case against a person with a prior record. . .") (quoting Richard D. Friedman, *Character Impeachment Evidence: Psycho-Bayesian Analysis and a Proposed Overhaul*, 38 UCLA L. REV. 637, 672 n.85 (1991)); *see also, e.g.*, Mike Comeaux, *Ex-Jurors Attack Reiner for Role in Buckeye Case*, L.A. TIMES, July 2, 1990, at N6 (where jurors in the infamous McMartin pre-school sexual abuse trial accused the District Attorney of Los Angeles with interfering in the case for political reasons [Ira Reiner was running in the Democratic primary race for Attorney General of California]).

93. Even if it could be proven that at the time of Ziggy's initial plea bargain, the prosecutors had held back a known complainant, that is not necessarily a ground for the claim of prosecutorial abuse. In *United States v. Krasn*, 614 F.2d 1229 (9th Cir. 1980), the Ninth Circuit noted that, "[a]lthough plea bargaining is a matter of criminal jurisprudence, a plea bargain itself is contractual in nature and 'subject to contract-law standards.'" *Id.* at 1233. "In certain cases, this duty of good faith would encompass an obligation to inform a defendant during plea bargain negotiations of other possible criminal charges which may be filed." *Id.* at 1234 (emphasis added). In *Krasn*, the court ruled that the failure to disclose a pending antitrust investigation against the defendant charged with "payment of gratuities to government meat graders" did not amount to the type of prosecutorial misconduct which equals a denial of due process. *See id.* at 1232, 1234. The primary two factors the court relied upon were (1) the fact that the gratuities charges and the antitrust violations "involved independent criminal transactions;" and (2) that the antitrust investigation was only at a "preliminary stage." *See id.* at 1234.

94. Common sense dictates that prosecutors be allowed to inform potential

Had the prosecutor used the plea bargained conviction to pressure and cajole the kids into making up a story to make the prosecutors happy and to get the prosecutors to leave them alone?⁹⁵ Had the prosecutor's repeated meetings with the young, impressionable kids planted ideas in the kids' heads which they began to believe as real after extended meetings with the police?⁹⁶ These concerns went more to the credibility of the kids' testimony than to prosecutorial misconduct per se.⁹⁷ The issue of the kids' credibility was an issue to be raised

witnesses what they could expect if they chose to come forward and press charges. For a discussion of what kinds of investigative techniques may constitute prosecutorial misconduct, see PROSECUTORIAL MISCONDUCT, *supra* note 70, § 1.2-.7; *supra* note 12.

95. Such occurrences are not unprecedented. In 1985, for example, seven defendants received the longest combined prison sentences for child molestation in California history, 2,600 years. See Miles Corwin, *Court Ruling Forces New Look At Sex Abuse Case*, L.A. TIMES, Sept 10, 1990, at A3. The alleged acts took place in Bakersfield, where in the mid-1980's sexual abuse cases were a high priority in Kern County. See *id.* In fact, the foreman of the Kern County Grand Jury in the mid-1980's, Glen Cole, remarked that "anyone accused of child molestation during that time had a very difficult time proving their innocence. . . . I think there are innocent people in jail right now." *Id.* The attorney for one of the seven defendants added that, "this is just like other cases of hysteria where kids were pounded on by investigators until the kids told them what they wanted to hear." *Id.* The California Court of Appeals agreed and overturned the convictions of the seven defendants because of prosecutorial misconduct on the part of the prosecutors and the trial judge. See *People v. Pitts*, 223 Cal. App. 3d 606 (1990). By 1994, all of the original witnesses who testified recanted and claimed to have been forced to testify in the manner they had. See *Pitts v. County of Kern*, 949 P.2d 920, 924 (Cal. 1998). See generally PAUL & SHIRLEY EBERLE, *THE ABUSE OF INNOCENCE: THE MCMARTIN PRESCHOOL TRIAL* (1993); *supra* note 12.

96. A child's initial report of abuse can be altered by suggestion. "Defense attorneys often try to discredit a child's testimony based on these deficiencies." Gail S. Goodman & Vicki S. Helgeson, *Child Sexual Assault: Children's Memory and the Law*, 40 U. MIAMI L. REV. 181, 187 (1985). Moreover, because "children often say so little in response to questioning . . . adults are tempted to ask suggestive questions of them. Asking suggestive and misleading questions of witnesses, particularly of young child witnesses, can lead to inaccurate reporting." *Id.* Police can, through leading questions, procure unreliable testimony from an allegedly abused child. See *id.* at 192-200; see also *supra* note 12. But cf. Richard Ginkowski, *The Abused Child: The Prosecutor's Terrifying Nightmare*, CRIM. JUST., Spring 1986, at 30, 33 (reporting a study by the American Bar Association's National Resource Center for Child Advocacy and Protection suggesting that children are no more influenced by leading questions than adults).

97. Such coercive conduct can reach the realms of prosecutorial misconduct if the coercive methods were so egregious that (1) they jeopardized the reliability of the children's statements and ability to accurately recall the alleged abuse, and (2) the court finds that the interview procedures could gravely impact the defendant's right to a fair trial. See *State v. Michaels*, 642 A.2d 1372, 1379-84 (N.J. 1994). In *Michaels*, the investigators told children they would feel better if they admitted to the abuse; gave them sexual information; used peer pressure by telling them what other children had admitted;

at trial, not a reason to dismiss the case before trial.⁹⁸ It looked like we were going to trial. Yes, "we" were going to trial. I had decided to continue to represent Ziggy.

The more I thought about the second trial, the more it felt like "*deja vu* all over again." There was no independent evidence corroborating the charges. Just like the first case, it would be a swearing match—Ziggy's word against the boys'.⁹⁹ Granted, there was a big difference. This time it would be Ziggy against several boys, but we still had a fighting chance. Juries tend to favor the word of an adult over the word of a child.¹⁰⁰ While the fact that there were multiple complainants with multiple charges might undermine this tendency,¹⁰¹ the prosecution still had a heavy burden to carry. Not only did the prosecution have to convince the jury that the boys' word should be believed over Ziggy's, but the prosecution had to convince the jury beyond a reasonable doubt.¹⁰²

offered bribes; and repeatedly demanded that the children tell them stories of abuse. See *id.* at 1380. The defendant was ultimately convicted on 115 counts of sexual abuse that were both "absurd" and "unimaginable." See Dana D. Anderson, Note, *Assessing the Reliability of Child Testimony in Sexual Abuse Cases*, 69 S. CAL. L. REV. 2117, 2132-33, 2144 (1996).

98. The credibility of the witness' testimony is a question of fact which cannot be disposed of by pre-trial motion. See RONALD BOYCE & ROLLIN PERKINS, *CRIMINAL LAW AND PROCEDURE* 1094, 1096-97 (7th ed. 1989).

99. See *supra* notes 15-16 and accompanying text. In the event the child victim is unable to testify, the prosecution's case often turns completely on the child's out-of-court statements. The admissibility of the child abuse victim's out-of-court statements present a unique set of legal challenges, including the issue of the need for corroborating evidence. See John C. Koski, *Idaho v. Wright: The Defenestration of Corroborating Evidence*, 46 U. MIAMI L. REV. 205, 226 (1991) ("The majority of courts that do examine corroborating evidence, however, consider the presence or absence of corroboration as only one factor in their overall analysis of a statement's trustworthiness."); see also *United States v. Thevis*, 665 F.2d 616 (5th Cir.), *cert. denied*, 459 U.S. 825 (1982). The *Thevis* test requires the court to (1) examine the circumstances surrounding the making of the statement, and (2) determine if there is any corroborating evidence. A statement is admissible only if both prongs are met. See *id.*

100. See Myers et al., *supra* note 85, at 92 ("Recent psychological research indicates that many adults are disposed to regard children as less credible than adults."). Many defense attorneys attempt to impeach a child's testimony "by arguing that developmental differences between adults and children render children less credible than adults." See Myers et al., *supra* note 85, at 86; see also Gail S. Goodman et al., *Jurors' Reaction to Child Witnesses*, 40 J. SOC. ISSUES, Summer 1984, at 142 (asserting studies support the position that jurors view children as less credible witnesses than adults).

101. See Cassia C. Spoh & Julie Horney, *Criminology: The Impact of Rape Law Reform on the Processing of Simple Aggravated Rape Cases*, 86 J. CRIM. L. 861, 876 (1996) (reporting rape study that concludes there is a greater likelihood of conviction if the defendant is charged with more than one crime).

102. See Fitzpatrick, *supra* note 36, at 192 ("When the child does testify, the jury's verdict often turns on whether they found the child's testimony more credible than the

Even where multiple complainants come forward, without independent evidence corroborating the testimony of the kids, it's tough to convince a jury beyond a reasonable doubt that the kids' word should be believed over an adult's.¹⁰³ I was buoyed by memories of the *McMartin* case, where two different juries acquitted the principal defendant, Raymond Buckey, of child sexual abuse despite the testimony of 124 witnesses.¹⁰⁴ And I had a more appealing defendant than Raymond Buckey. Ziggy was a successful, respected member of the community. As the director and head coach of the Kickers soccer program, he had developed an assertive, out-going personality. He had an aura about him. Although we had some concerns about how the jury would perceive him and how well they would understand him because of his thick accent,¹⁰⁵ I was convinced that with a little coaching of my own, I could make him a great witness. Although we were outnumbered, I still felt good about our chances—until I factored in the plea bargained conviction.

The more I thought about the plea bargained conviction, the more my heart sank. As soon as the jury learned of his prior conviction for sexual misconduct involving a minor, it would be all over.¹⁰⁶ Any "reasonable doubt" the jury

defendant's. The child's testimony is frequently insufficient to meet the evidentiary requirement of 'beyond a reasonable doubt' for a criminal conviction.").

103. See Sopher, *supra* note 6, at 643 ("Evidentiary hurdles join with Bill of Rights guarantees to make it extremely hard to prove child molestation beyond a reasonable doubt."); see also CRIMINAL DEFENSE TECHNIQUES, *supra* note 16, § 78A.01(3)(b).

Jurors tend to believe that children notice less about certain circumstances than adults, omit more facts and information when relating an earlier event, tend to forget faster, are more susceptible to suggestion, and tend to mix fact and fantasy when remembering an earlier event . . . and are generally willing to please those in authority.

CRIMINAL DEFENSE TECHNIQUES, *supra* note 16, § 78A.01(3)(b).

104. The infamous *McMartin* trial lasted six-and-a-half years and cost over \$15 million, making it the longest, costliest trial in United States history. See Pat Dillon, *The Lessons From McMartin*, THE RECORD (New Jersey), Jan. 26, 1990, at B9. The *McMartin* case began with a single complaint by a mother who was later diagnosed with acute paranoid schizophrenia. See Margaret Carlson, *Six Years of Trial by Torture*, TIME, Jan. 29, 1990, at 26. It grew to over 200 counts against seven employees of the *McMartin* pre-school. After a year-and-a-half preliminary hearing, all the charges against five employees were dropped, leaving a total of 99 counts against 26-year old Raymond Buckey and his 59-year old mother, Peggy *McMartin* Buckey. See Deutsch, *supra* note 7, at A45. In the first trial, both defendants were acquitted on 52 counts, with 13 counts against Raymond Buckey ending in mistrial. Raymond Buckey was retried on 8 of the 13 remaining counts and ultimately acquitted of all the charges. See Mary-Ann Bendel, *McMartin Trial Ends, Its Effects Linger*, USA TODAY, July 30, 1990, at 3A.

105. See *supra* note 25 and accompanying text.

106. See Hornstein, *supra* note 42, at 1 ("If the jury learns that a defendant previously has been convicted of a crime, the probability of conviction increases dramatically," and that's not taking into account the particularly prejudicial nature of prior convictions involving sexual misconduct.); *supra* note 63; see also *infra* note 155.

might have would vanish. Ziggy really hadn't been "convicted."¹⁰⁷ He had pled guilty to avoid the risks, costs, and fallout of a trial.¹⁰⁸ Such reasoning, however, would be lost upon a jury faced with twenty-five new counts of child molestation, many of an awful nature.

The jury would assume, no doubt, that since he had done it before, he had done it again.¹⁰⁹ Funny, inasmuch as all of the new counts of child sexual abuse actually predated the original incident, it really wasn't accurate to say "*since he had done it before, he had done it again.*" Rather, the reasoning would be "*since he did it once, he must have done it before.*" Although this rephrasing highlighted the problem of assuming that just because somebody did something once they would do it again (or did it before), such logical niceties would be lost upon the jury. All they would care about is that he was a convicted child molester who was facing twenty-five new counts of child sexual abuse. For all practical purposes, the prosecution wouldn't even have to put the kids on the stand.¹¹⁰ Once the jury heard about the prior conviction, he wouldn't stand a chance.¹¹¹ I had to make sure the jury didn't learn about the prior conviction.

There were two ways the prosecution could try to introduce the evidence of the prior conviction to the jury. First, the prosecution could try to use the prior conviction to prove that Ziggy actually committed the acts underlying the

107. Although technically the defendant who has pled guilty to an offense has not been "convicted" by a judge or jury, he has entered a formal confession of guilt that is the equivalent of a guilty verdict. See BOYCE & PERKINS, *supra* note 98, at 1103-04.

108. See *supra* notes 22-27 and accompanying text.

109. See *supra* note 63; see also Note, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 YALE L. J. 763 (commenting upon jury's tendency to infer defendant's guilt because he was found guilty of a different offense in the past); *supra* note 104. If the evidence is admitted solely for impeachment purposes, a plea bargained "conviction" has peculiar consequences. On the one hand, the defendant's admission of guilt could be construed as some evidence that the defendant was truthful about his past mistakes. See Hornstein, *supra* note 42, at 13. Conversely, if the jury is unable to separate the impeachment value of the prior conviction from its substantive value, the jury may conclude that, because the defendant is obviously an admitted child molester, he must be lying about the present incident. See Hornstein, *supra* note 42, at 9.

110. See Anne Elsberry Kyl, Note, *The Propriety of Propensity: The Effects and Operation of New Federal Rules of Evidence 413 and 414*, 37 ARIZ. L. REV. 659, 663 (1995). Kyl states:

Jurors may wish to convict, not because they believe the evidence presented proves beyond a reasonable doubt that the defendant committed this particular crime, but because they believe that defendant is more likely to commit such acts because he has done it before or because he has not been punished previously for these acts.

Id. (citing WIGMORE ON EVIDENCE § 58.2 (Tillers rev. 1983)).

111. See *supra* notes 63, 106-10 and accompanying text.

new charges;¹¹² and second, if Ziggy took the stand to testify, the prosecution could try to use the conviction to impeach his credibility.¹¹³ I filed a motion *in limine* in an attempt to bar the prosecution from using the evidence either way.¹¹⁴ I knew that, for all practical purposes, Ziggy's fate turned on the court's ruling on the motion.

Of course, the prosecution opposed my motion. The prosecution asserted the State should be permitted to use the prior conviction both to prove that Ziggy actually committed the acts underlying the new charges and to impeach his credibility if he testified. As for the former—using the prior conviction to help prove he committed the new allegations—evidence is admissible if it is relevant, *i.e.*, if it would help the jury determine what actually happened.¹¹⁵ The essence of the prosecution's argument was that (1) bad people do bad things; (2) Ziggy is a bad person because he has a prior conviction for sexual misconduct involving a minor; therefore, (3) he did the bad things charged in the second case.¹¹⁶

I had to admit that there was some appeal to the prosecution's argument. To a degree, we are all creatures of habit.¹¹⁷ But, when given time to reflect

112. See *infra* notes 115-50 and accompanying text.

113. See *infra* notes 151-58 and accompanying text.

114. When there is a possibility that evidence of prior similar offenses against third party victims or multiple acts on the same victim will be introduced at trial, a *motion in limine and suppression* should be filed with the court to instruct the State's attorneys and witnesses not to "allude to, refer to, or in any manner bring before the jury any reference that the defendant has committed other offenses or misconduct pertaining to sexual abuse, molestation, or exploitation." Heeney, *supra* note 53, at 16 (citing *Cross v. State*, 386 A.2d 757 (Md. 1978); *Ross v. State*, 350 A.2d 680 (Md. 1976); *Wentz v. State*, 150 A.2d 278 (Md. 1930)).

115. See FED. R. EVID. 402. The rules of evidence vary from jurisdiction to jurisdiction. For purposes of this Article, unless otherwise noted, the Federal Rules of Evidence will be considered indicative of the present state of the law concerning the admissibility of evidence. See FED. R. EVID. 401 (defining what constitutes relevant evidence); FED. R. EVID. 403 (providing that relevant evidence may be excluded if its probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues . . . misleading the jury, . . . undue delay, [or] waste of time").

116. The prosecutor's reasoning is indicative of what is known as the 'propensity' argument: the accused's character, as evidenced by his or her past conduct, is relevant because it shows the accused's propensity to commit the crime with which he has been charged. See 2 WEINSTEIN'S FEDERAL EVIDENCE § 404.12(3), at 404-29 (J.M. McLaughlin ed., 1998).

117. See 1A WIGMORE, *supra* note 110, § 55, at 1157-59. Wigmore states: A defendant's behavior, then, as indicating the probability of his doing or not doing the act charged, is essentially relevant. In point of human nature in daily experience, this is not to be doubted. The character or disposition - *i.e.*, a fixed trait or the sum of traits - of the persons we deal with is in daily life always more or less considered by us in estimating the probability of their future conduct.

dispassionately about the prosecution's argument, most people see its deficiencies. We all make mistakes of varying degrees at one point or another. Just because a person makes a mistake once, the person should not be branded as a bad person generally. Nor should the person's mistake on one occasion be used to prove that he or she acted the same way on another occasion.¹¹⁸ Hence the general rule that evidence of a defendant's bad character or prior bad acts is *not* admissible to prove that the defendant committed the charged acts.¹¹⁹ The risk is simply too great that the jury will be prejudiced by the evidence of the defendant's bad character or prior bad acts and will convict the defendant not on the evidence concerning the charged acts, but for the defendant's past acts.¹²⁰

1A WIGMORE, *supra* note 110, § 55, at 1157-59. See also WEINSTEIN, *supra* note 116, § 404.10(1), at 404-11 ("The rationale underlying this exclusionary rule, commonly referred to as 'the propensity rule,' is that, although such evidence *may be relevant* under Rule 401, its prejudicial effect outweighs its probative value.") (emphasis added); David J. Kaloyanides, Comment, *The Depraved Sexual Instinct Theory: An Example of the Propensity For Aberrant Application of Federal Rule of Evidence 404(B)*, 25 LOY. L.A. L. REV. 1297, 1326 (1992). Kaloyanides states:

[B]ecause specific acts evidence will at least create a character propensity and therefore be relevant, character propensity evidence would be admissible. Yet, as a matter of policy, Rule 404 prohibits evidence when offered for the purpose of creating such a character propensity inference, and thus, the evidence despite its relevance is excluded.

Id.

118. "Psychological research indicates that disposition, or character, is a very poor predictor of conduct on a specific occasion." Jeffrey G. Pickett, Comment, *The Presumption of Innocence Imperiled: The New Federal Rules of Evidence 413-415 and the Use of Other Sexual Offense Evidence in Washington*, 70 WASH. L. REV. 883, 886 (1995) (citing Miquel Angel Mendez, *California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. REV. 1003, 1052 (1984)).

119. See FED. R. EVID. 404(a). Although prior acts may not be introduced to prove the defendant's bad character, the court has discretion to allow the evidence for other purposes, such as motive, opportunity, intent, preparation, plan, knowledge, etc. See FED. R. EVID. 404(b); MCCORMICK ON EVIDENCE § 190, at 557-58 (E. Cleary ed., 1984); see also WRIGHT & GRAHAM, *supra* note 37, § 5231 (listing 15 states that have adopted statutes very similar to Federal Rules of Evidence 404(b)).

120. The rationale behind the exclusionary rule is expressed in *United States v. Daniels*, 770 F.2d 1111, 1116 (D.C. Cir. 1985). In *Daniels*, the court states:

The exclusion of bad acts evidence is founded not on the belief that the evidence is irrelevant, but rather on a fear that juries will tend to give it excessive weight, and on a fundamental sense that no one should be convicted of a crime based on his or her previous misdeeds.

Id. See also WEINSTEIN, *supra* note 116, § 404.10(1), at 404-11. Weinstein asserts: The rationale underlying this exclusionary rule, commonly referred to as "the propensity rule," is that, although such evidence may be relevant under Rule 401, its prejudicial effect outweighs its probative value. In other words, it has traditionally been improper to use character evidence circumstantially to show a

The problem is that most people, most courts, and most legislators do not think dispassionately when confronted with claims of child sexual abuse.¹²¹ For many people, there is no more heinous act than child sexual abuse.¹²² Our society despises people who engage in such acts. To the extent there is no prior record, we tend to give a defendant the benefit of the doubt—although begrudgingly in child sexual abuse cases since most people believe one should avoid any situation that could give rise to even a claim of sexual abuse.¹²³ If, however, the defendant has already been convicted of child sexual abuse, most people don't give the defendant the benefit of the doubt.¹²⁴ They may "mouth" the maxim "innocent until proven guilty," but their actions speak louder than their words.

So, although the general rule is that evidence of a defendant's bad character or prior bad acts is not admissible to prove that the defendant committed the charged act, such is not the case when it comes to sexual misconduct. Increasingly, evidence of the accused's sexual propensity is now admissible in cases prosecuting sexual offenses to prove that the accused acted in conformity

defendant's propensity to commit bad acts because the evidence has insufficient probative value and because prejudice or confusion is likely to result from its admission.

WEINSTEIN, *supra* note 116, § 404.10(1), at 404-11.

121. See WRIGHT & GRAHAM, *supra* note 37, § 5412(A) (observing that "courts and legislatures frequently most consider questions of child sexual abuse in a climate that borders on hysteria"); see also *supra* notes 1, 63; *infra* note 122.

122. "For the average adult, few subjects evoke stronger emotions than children, victimization and sex. Put the three together to form child sexual abuse, and the stage is set for emotional pyrotechnics." John E. B. Myers, *The Child Sexual Abuse Literature: A Call for Greater Objectivity*, 88 MICH. L. REV. 1709, 1709 (1990). Most people react negatively to a person who is even *accused* of being a child molester. See *supra* notes 1, 63, 121. Compare Howson, *supra* note 24, with Renshaw, *supra* note 24.

123. See Joelle Anne Moreno, "Whoever Fights Monsters Should See to it that in the Process She Does Not Become a Monster:" *Hunting the Sexual Predator With Silver Bullets - Federal Rules of Evidence 413-415 - and a Stake Through the Heart - Kansas v. Hendricks*, 49 FLA. L. REV. 505 (1997).

124. See *supra* note 63; see also Pickett, *supra* note 118. Whether juries will give the defendant the "benefit of the doubt" may be a function of the current political climate. See Fitzpatrick, *supra* note 36, at 175-77 (noting that the changes in the criminal justice system in the past two decades have served to make the prosecution of sexual abusers easier). In the 1980's, allegations of child molestation were reaching a fever pitch, leading some to compare the era with the Salem witch hunts. See Ellen Willis, *Child Abuse: The Search for Scapegoats Usually the Crime Occurs at Home; So Why a Witch-hunt in Day-care Centers?*, NEWSDAY, May 30, 1990, at 55. Now, some commentators argue that, in reaction to the near hysteria of the eighties, the pendulum has swung too far back in favor of the defendant. See, e.g., Vachss, *supra* note 26, at 5 ("In Salem, there were no witches. In 20th century America, sexual predators do exist—in alarming numbers.").

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with his propensity and committed the charged acts.¹²⁵ Historically, there was always an exception to the general rule if the evidence was offered for purposes other than to show the defendant acted in conformity with his or her character,¹²⁶

125. FED. R. EVID. 413-15 are indicative of this trend. Passed in 1994, these three rules allow evidence of prior bad acts in sexual abuse cases to prove the underlying charge. Rule 414 reads, in pertinent part:

(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

(d) For purposes of this rule and Rule 415 [dealing with civil cases], "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State . . . that involved . . .

(3) contact between any part of the defendant's body or an object and the genitals or anus of a child;

(4) contact between the genitals or anus of the defendant and any part of the body of a child

FED. R. EVID. 414. Senator Dole, who co-sponsored the amendment to the Federal Rules, stated: "The new rules will supersede in sex offense cases the restrictive aspects of Federal rule of evidence 404(b)." 140 CONG. REC. S12, 990-01 (daily ed. Sept. 20, 1994) (statement of Sen. Dole). Senator Dole explained the purpose of the new rules:

The presumption is that the evidence admissible pursuant to these rules is typically relevant and probative, and that its probative value is not outweighed by any risk of prejudice.

In line with this judgment, the rules do not impose arbitrary or artificial restrictions on the admissibility of evidence. Evidence of offenses for which the defendant has not previously been prosecuted or convicted will be admissible, as well as evidence of prior convictions. No time limit is imposed on the uncharged offenses for which evidence may be admitted; as a practical matter, evidence of other sex offenses by the defendant is often probative and properly admitted, notwithstanding substantial lapses of time in relation to the charged offense or offenses The courts should liberally construe the rules so that the defendant's propensities, as well as questions of probability in light of the defendant's past conduct, can be properly assessed.

Id. The most significant limit on the rule is the "evidence of offense" language. See WRIGHT & GRAHAM, *supra* note 37, § 5415 ("[I]nnuendoes about the defendant's propensity continue to be governed by Rule 404(b)."). While not all states have adopted legislation similar to the new Federal Rules, some commentators argue that the new rules are really little more than a codification of state "lustful disposition exceptions." See Kyl, *supra* note 110, at 668 (arguing that the "types of evidence that are allowed directly address the policy concerns that bolster the existing state exceptions").

126. See WEINSTEIN, *supra* note 116, § 404.12(3), at 404-32; see also FED. R. EVID. 404(b). Generally, state courts follow the Federal Rules of Evidence in disallowing evidence of the defendant's bad character in order to show that the defendant acted in conformity therewith; however, such evidence may be admitted for other purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." See FED. R. EVID. 404(b).

as if the judge and jury are going to know what that means or know the difference in why the evidence is being admitted and limit its use accordingly.¹²⁷ Sometimes I think the criminal justice system simply doesn't understand human nature—or maybe it does, but it wants to give the appearance of fairness. But when it comes to crimes of a sexual nature, the courts have ruled in favor of the exception so often that the exception has become the rule.¹²⁸ A number of legislatures have even gone so far as to codify the rule. Thus, in cases prosecuting sexual offenses, evidence of the accused's sexual propensity generally is admissible to prove that the accused acted in conformity with his or her propensity and committed the charged acts.¹²⁹ The trial court may exclude the evidence of prior sexual misconduct only if it concludes that its prejudicial effect substantially outweighs its probative value.¹³⁰

The prejudicial effect of Ziggy's prior conviction for sexual misconduct involving a minor was undisputable.¹³¹ I emphasized the immediate and emotional reaction people have to learning that a person has sexually abused a child.¹³² There is no understanding, no compassion. Unlike most crimes, where one can envision a scenario in which one might commit the crime, the same is not true of sexual misconduct involving young children. Most people cannot envision a scenario in which they would be even *tempted* to commit the crime. Most people see the act as such a depraved act that they condemn not only the act, but the actor.¹³³ If the jury were to learn that Ziggy had been convicted of molesting a child before, they would simply assume that he had done it again.¹³⁴

127. See Andrew J. Morris, *Federal Rule of Evidence 404(B): The Fictitious Ban on Character Reasoning From Other Crime Evidence*, 17 REV. LITIG. 181 (1998).

128. See WIGMORE, *supra* note 110, § 62.2, at 1334-35. Wigmore asserts: An exhaustive analysis of the cases . . . shows there is a strong tendency in prosecutions for sex offenses to admit evidence of the accused's sexual proclivities. Do such decisions show that the general rule against the use of propensity evidence against an accused is not honored in sex offense prosecutions? We think so.

WIGMORE, *supra* note 110, § 62.2, at 1334-35. See also Fitzpatrick, *supra* note 36, at 187 (asserting that the trend by courts is to relax evidentiary requirements when the charge is child sexual abuse).

129. See *supra* note 125.

130. At first, some commentators questioned whether the courts could exclude the evidence on those grounds, but in time the better reasoned position developed that the courts still had to determine whether the evidence was admissible under Federal Rule of Evidence 403, which permits the court to exclude the evidence if its probative value is substantially outweighed by danger of its prejudicial effect. See WEINSTEIN, *supra* note 116, § 414.04(2).

131. See WEINSTEIN, *supra* note 116, § 414.04(2).

132. See *supra* notes 63, 120-24 and accompanying text.

133. See *supra* notes 24, 27 and accompanying text; see also *supra* notes 63, 120-24.

134. See Kyl, *supra* note 110, at 663. See also *supra* note 63.

He'd be found guilty by virtue of his prior conviction, not by virtue of the merits of the second case.¹³⁵

The jury's likely reaction was all the more ludicrous when one remembered that Ziggy had not actually been convicted by a jury of his peers; he had pled guilty just to put the matter behind him.¹³⁶ The prosecution, however, reminded the court that a plea bargained conviction legally is tantamount to a conviction following a trial.¹³⁷ Maybe in form, I argued, but not in substance—but this apparently is one area where the law favors form over substance.¹³⁸ The judge made it clear that both he and the prevailing law viewed a plea bargained conviction the same way as a conviction following a full blown trial.¹³⁹ Besides, the defendant need not be convicted for the evidence to be admissible. All that is necessary is that there is evidence the defendant committed a similar offense.¹⁴⁰ Nevertheless, I maintained that the jury's knee-jerk reaction to learning that Ziggy had previously been convicted of a crime involving sexual misconduct with a minor would be so prejudicial that it had to substantially outweigh any probative value the prior conviction may have.

The prosecution countered by invoking the legislative amendments to the rules of evidence concerning character evidence. The prosecution argued that the legislature's action in amending the rules expressly to admit evidence of the defendant's other sexual misconduct creates, at a minimum, a strong presumption that such evidence is more probative than prejudicial.¹⁴¹

The prosecution also asserted, rather boldly I might add, that the evidence of Ziggy's prior sexual misconduct was more probative than prejudicial because there simply *is* something different about people who sexually abuse children. Most criminal conduct is the result of either isolated acts of passion or premeditated acts that the actor consciously engages in following a thorough

135. See Kyl, *supra* note 110, at 663. See also *supra* note 63.

136. See *supra* notes 28-44 and accompanying text.

137. See *supra* note 58.

138. See *supra* note 58.

139. See *Kercheval v. United States*, 274 U.S. 220, 223 (1927) ("A plea of guilty . . . is itself a conviction. . . . [m]ore is not required; the court has nothing to do but give judgment and sentence.").

140. See FED. R. EVID. 414.

141. See Jane Harris Aiken, *Sexual Character Evidence in Civil Actions: Refining the Propensity Rule*, 1997 WIS. L. REV. 1221, 1240-44 (arguing that the adoption of Federal Rules of Evidence 413-415 would make it much more difficult for court to exclude propensity evidence in sexual offense cases on the grounds that the purpose of such rules was exactly to facilitate the admissibility of such evidence); see also *United States v. Meacham*, 115 F.3d 1488, 1492 (10th Cir. 1997) ("Clearly under Rule 414 the courts are to 'liberally' admit evidence of prior uncharged sex offenses."); 140 CONG. REC. S12, 990-01 (daily ed. Sept. 20, 1994) (statement of Sen. Dole) ("The presumption is that evidence admissible pursuant to these rules is typically relevant and probative, and that its probative value is not outweighed by any risk of prejudice.").

analysis of the risks and benefits involved. In either event, the prosecution conceded that for most crimes there is little reason to believe that just because a person committed a crime once, he would be likely to commit the same crime again.¹⁴² The prosecution argued, however, that child molesters are different. Child molesters arguably suffer from a depraved sexual instinct which drives them to molest children over and over.¹⁴³ If a person has a depraved sexual instinct, it is analogous to suffering from an addiction that is more powerful than the person's self-control. They indulge their depraved sexual urges despite their better judgment.¹⁴⁴ Since a person would sexually abuse a child only if the person suffers from a depraved sexual instinct, having committed the crime once, it is appropriate to assume that the person would likely commit the crime

142. The inadmissibility of character/propensity evidence has a long history in Anglo-American jurisprudence, rooted in the fundamental principle of presumption of innocence. See *Kyl, supra* note 110, at 664. Evidence that the defendant is a "bad man" and thus likely to have committed the offense charged is inadmissible at criminal trials. See *Kyl, supra* note 110, at 664 n.34; see also *supra* notes 118-20.

143. "We all probably accept that people who commit violent sex crimes and molest children are different from the rest of us. The historically recognized 'lustful disposition' exception embodied that belief." Major Bruce D. Landrum, *Military Rule of Evidence 404(b): Toothless Giant of the Evidence World*, 150 MIL. L. REV. 271, 334 (1995). The "lustful disposition" exception is also known as the sexually depraved instinct theory. See *Kaloyanides, supra* note 117, at 1309. Kaloyanides states:

Under the guise of showing intent, motive, continuing scheme or plan, and even identity, the Depraved Sexual Instinct Theory is becoming an absolute exception to the prohibition against admitting specific acts evidence to create a character propensity inference. The theory permits the prosecution to introduce evidence of specific instances of the accused's sexual conduct in order to show the accused has a propensity or proclivity—an "instinct"—for deviant sexual behavior. Once established, the prosecution is then permitted to argue that as the accused possesses this inclination for aberrant sexual behavior, he is more likely to be motivated, to intend or to plan to commit a crime involving sexually depraved conduct.

Kaloyanides, supra note 117, at 1309. Prior to adoption of Federal Rule of Evidence 414 (and its equivalent at the state level), many jurisdictions admitted evidence of the accused sexual propensity under this exception to the general rule that character evidence was not admissible to prove that the accused acted in conformity with his or her character. See Lisa M. Segal, Note, *The Admissibility of Uncharged Misconduct Evidence in Sex Offense Cases: New Federal Rules of Evidence Codify the Lustful Disposition Exception*, 29 SUFFOLK U. L. REV. 515 (1995).

144. See BURGESS ET AL., *supra* note 9, at 6-11 (classifying sexual offenders in two classes, fixated persons, who are sexually addicted to children; and regressed persons, who commit the act out of depression or inability to cope with reality; and explaining that child molesters generally commit the act because of deeper psychological issues, often because they were abused as children).

again.¹⁴⁵ It's the nature of the addiction. To support their theory, the prosecution cited to the recidivism rate for defendants convicted of child sexual abuse.¹⁴⁶

I knew I was in trouble. The prosecution's arguments were intuitively appealing. Most people do think differently about the crime of child sexual abuse and those who commit it.¹⁴⁷ There is, however, no scientific evidence to support the depraved sexual instinct theory.¹⁴⁸ As for the statistical support based on the recidivism rate for child molesters, the problem with that argument is that it becomes a self-fulfilling prophecy.¹⁴⁹ Once a defendant has been convicted of sexual abuse, the argument basically assumes that if charged again, the defendant probably did it. The prejudicial effect of the prior conviction is so great that once introduced into evidence, the jury will assume that the defendant did it again.¹⁵⁰ The de facto effect of introducing the prior conviction is to shift the burden of proof to the defendant to prove that he or she did not commit the alleged act. Because most child sexual abuse cases are swearing matches, this burden is almost impossible to overcome. The odds are that the defendant will be convicted, which results in a high recidivism rate for child molesters. To the extent the recidivism rate may appear to support the theory, it really only proves the prejudicial effect of the prior conviction evidence.

The prosecution also argued that even if it could not use the evidence of Ziggy's prior conviction substantively to prove he committed the charged acts, the State should be permitted to use the prior conviction to impeach Ziggy's

145. One writer observes:

The past conduct of a person with a history of . . . child molestation provides evidence that he or she has the combination of aggressive and sexual impulses that motivates the commission of such crimes and lacks the inhibitions against acting on these impulses. A charge of [sexual abuse] has greater plausibility against such a person.

Jason L. Mccandless, Note, *Prior Bad Acts and Two Bad Rules: The Fundamental Unfairness of Federal Rules of Evidence 413 and 414*, 5 WM. & MARY BILL RTS. J. 689, 696 (1997). "[I]t is highly unlikely that a person whose prior acts show him to be a rapist or child molester would be falsely accused." *Id.* at 692 (quoting Congresswoman Susan Molinari (R-N.Y.), from her statements regarding the adoption of the new Federal Rules of Evidence).

146. Although most commentators cite a high rate of recidivism, more recent works have challenged that assertion. See *supra* note 46; see also Mccandless, *supra* note 145, at 691 n.13 (citing a 1989 Bureau of Justice Statistics Report showing the recidivism rate for sex offenders is actually lower than that of other serious criminals).

147. See *supra* note 143; *infra* note 148.

148. See *supra* note 119. Although not scientifically proven, the depraved instinct theory is widely accepted by the courts. See Mccandless, *supra* note 145, at 698, nn.51-53 (noting that most states and the federal courts accept the depraved instinct theory); see also *supra* note 143.

149. See *supra* note 146 (noting the conflicting reports on the rate of recidivism).

150. See Hornstein, *supra* note 42, at 11; see also *supra* note 63.

credibility if he testified.¹⁵¹ Prior convictions can be used to impeach a witness's credibility if the prior conviction was for a crime that (1) involves a false statement or dishonesty, or (2) is punishable by more than one year in a prison, and if the court, in its discretion, concludes that the probative value of the prior conviction outweighs its prejudicial effect.¹⁵² Although the crime which Ziggy pled guilty to, sexual misconduct involving a minor, does not involve a false statement or dishonesty, it is punishable by more than one year in prison. We were back to square one. Did the probative value of Ziggy's prior conviction for child sexual abuse outweigh its prejudicial effect?

I reasserted my position as to the obvious emotional, prejudicial effect of the prior conviction.¹⁵³ The prosecution, however, reminded the court that it could give a limiting instruction to the jury admonishing them to consider the conviction not as proof of Ziggy's guilt in the present case, but only as it affects his credibility.¹⁵⁴ Yeah, right. Like anybody could really make that mental distinction, much less a jury considering twenty-five counts of deviate sexual abuse on two young, vulnerable boys.¹⁵⁵ We were back to the criminal justice system's peculiar view of human behavior.

151. Generally, a jury may consider evidence of a defendant's prior convictions for the purposes of assessing his credibility as a witness. *See United States v. Coats*, 652 F.2d 1002 (D.C. Cir. 1981). If the crime offered to impeach a witness's credibility does not involve dishonesty or false statement, FED. R. EVID. 609 permits introduction of evidence of prior convictions for the purpose of attacking the credibility of the accused only if "the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused." The Federal Rules of Evidence serve as a model for the majority of states (as of 1996, 38 states and the military). *See Hornstein, supra* note 42, at 7.

152. FED. R. EVID. 609(a)(1).

153. *See supra* note 63; *supra* notes 122-24 and accompanying text.

154. *See WEINSTEIN, supra* note 116, § 609.06 (discussing propriety of court instructing the jury that "a witness's prior conviction should be considered only to assess the credibility of the witness, not as evidence that the defendant is guilty"); *see also* Mary Katherine Danna, Note, *The New Federal Rules of Evidence 413-415: The Prejudice of Politics or Just Plain Common Sense?*, 41 ST. LOUIS U. L.J. 277, 282 n.33 (1996) (noting that due to the new Federal Rules, the prior acts evidence is admitted as to an issue of the case rather than as character evidence, thus it is admissible with limiting instructions, but "[c]ourts have repeatedly commented on the uselessness of limiting instructions in such situations").

155. Limiting instructions are notoriously ineffective. *See Roselle L. Wissler & Michael J. Saks, On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 LAW & HUM. BEHAV. 37 (1985) (conducting a case study and discovering a significantly higher conviction rate when the jury was informed about a defendant's prior convictions). "Despite limiting instructions, the jury is likely to consider this evidence for the improper purpose of determining whether the accused is the type of person who would engage in criminal activity, in general, or would commit the specific crime charged." *Id.* at 38 (quoting *People v. Fries*, 24 Cal.3d 222 (1979)). *See also infra* note 171.

The prosecution also emphasized the importance of credibility in determining the truth in this case.¹⁵⁶ I thought that argument cut both ways. Since there rarely is corroborating evidence in child sexual abuse cases, the trial is nothing more than a credibility battle.¹⁵⁷ If you take away the defendant's credibility, he has nothing left with which to fight. Yet the prosecution turned the situation on its head, arguing that since the case turned completely on the credibility of the witnesses, it was important for the jury to have all the information relevant to determining the credibility of the witnesses, including the defendant's credibility if he took the stand.¹⁵⁸

The arguments on the motion *in limine* were heated at times. I knew we had given it our best shot, but I felt I was swimming upstream the whole time. Although the general rule is that evidence of prior crimes is not admissible to prove that the defendant acted in conformity with his past, in cases involving aberrant sexual behavior the exception has become the rule. Courts usually admit the evidence.¹⁵⁹ Although the crime of child sexual abuse intrinsically

156. In *Gordon v. United States*, 344 U.S. 414 (1953), the Supreme Court suggested six factors the trial court should consider in assessing whether or not to allow the introduction of evidence of the defendant's prior convictions for impeachment purposes: "1) the nature of the alleged crime; 2) the time interval between the prior conviction and the present charge; 3) the subsequent career of the person; 4) the similarity of the prior conviction to the alleged crime; 5) the importance of the defendant's testimony; and 6) the posture of the case." *Id.* See also WEINSTEIN, *supra* note 116, § 609.04(2)(a)(i). Weinstein notes that noting that in evaluating the probative value versus the prejudicial effect of permitting the prosecution to use evidence of a prior conviction not involving dishonesty or false statement, the courts generally focus on five factors: "1) the impeachment value of the prior crime; 2) the point in time of the conviction and the witness's subsequent history; 3) the similarity between the past crime and the charged one; 4) the importance of the defendant's testimony; 5) the centrality of the credibility issue." WEINSTEIN, *supra* note 116, § 609.04(2)(a)(i).

157. See *supra* note 16 and accompanying text.

158. The sponsors of the new Federal Rules of Evidence 414 and 415 expressed this sentiment:

The reform effected by these rules is critical to the protection of the public from rapists and child molesters, and is justified by the distinctive characteristics of the cases to which it applies. In child molestation cases, for example, a history of similar acts tends to be exceptionally probative because it sows an unusual disposition of the defendant—a sexual or sado-sexual interest in children—that simply does not exist in ordinary people. Moreover, such cases require reliance on child victims whose credibility can readily be attacked in the absence of substantial corroboration. In such cases, there is a compelling public interest in admitting all significant evidence that will shed some light on the credibility of the charge and any denial by the defense.

WIGMORE, *supra* note 110, § 5414. See also WEINSTEIN, *supra* note 116, § 609.04(2)(a)(vi) (noting that "[w]hen the defendant's credibility is a central issue, this weighs in favor of admitting a prior conviction").

159. See *supra* notes 128-29 and accompanying text; see also CRIMINAL DEFENSE

does not involve dishonesty or false statements, courts have almost uniformly permitted the prosecution to use the prior conviction to impeach the defendant's credibility if the defendant takes the stand.¹⁶⁰ The standards we have set up to ensure a fair trial just don't seem to apply to defendants charged with aberrant sexual crimes.¹⁶¹ Instead, our judicial system appears to have concluded that if they did it before, they probably did it again, so don't bother worrying about their rights. Just have the court throw in some limiting instructions so it looks fair, but we all know how the jury will really use the evidence.¹⁶²

Yeah, I was starting to get cynical. I could see the handwriting on the wall. This had become a high profile case. Ever since *the* District Attorney took over the case, the media had been closely following and reporting on every development, and the D.A. had an incentive to push the media's coverage of the case. He was slowly but surely becoming the odds on favorite to be the next County Supervisor. He was banking on this case to seal his victory. He had tried and convicted Ziggy in the press well before the trial. What were the chances that a judge would risk his or her judicial reputation for Ziggy, an admitted child molester?¹⁶³ Any chance of that happening probably went out the

TECHNIQUES, *supra* note 16, § 78A.01(4) (noting that there is a trend toward allowing more evidence to obtain convictions in sexual abuse cases). "This trend seems to be eroding the rights of persons accused of the crimes, while affording the prosecution more tools to obtain a conviction." CRIMINAL DEFENSE TECHNIQUES, *supra* note 16, § 78A.01(4).

160. Generally, evidence of a defendant's prior sex crimes is routinely admitted to impeach the defendant's credibility. See Ed Gainor, Note, *Character Evidence By Any Other Name . . . : A Proposal to Limit Impeachment By Prior Conviction Under Rule 609*, 58 GEO. WASH. L. REV. 762, 766-77 (1990) ("Many courts . . . continue to admit evidence of prior conviction of violent crimes, sex crimes, and drug offenses for purposes of impeachment, even though the prior offense is similar to the crime charged, and often without any on-the-record balancing of probative value against prejudicial effect."); Wade Habeeb, Annotation, *Right to Impeach Credibility of Accused By Showing Prior Conviction, As Affected By Remoteness in Time of Prior Offense*, 67 A.L.R.3d 824, § 20, at 198 (Supp. 1998); see also, e.g., *Minnesota v. Bias*, 419 N.W. 2d 480, 487 (Minn. 1988) (holding that, while sex crimes "have less bearing on veracity than do many other crimes . . . [s]uch evidence allows the jury to view the 'whole person' and thus judge better the truth of his or her testimony"). But cf. *Minnesota v. Perez*, 397 N.W. 2d 916, 921 (Minn. Ct. App. 1986) (holding that the prejudicial effect of a seven year old conviction for sexual misconduct outweighed its probative value in a trial for aggravated robbery).

161. See WIGMORE, *supra* note 110, § 62.2, at 1334-35; Wissler & Saks, *supra* note 155.

162. "Character propensity evidence creates an inferential sequence within the minds of jurors that (1) the accused has a unique, abnormal propensity to commit certain acts; (2) that he acts on that propensity; and (3) having done so repeatedly in the past he will do so in the future." Kyl, *supra* note 110, at 663. See also *supra* notes 154-55.

163. See Kurt E. Scheuerman, *Rethinking Judicial Elections*, 72 OR. L. REV. 459, 480-82 (1993) (discussing the impact of elections on justices in Oregon and California, <https://scholarship.law.missouri.edu/mlr/vol64/iss2/2>)

window with the advent of elected judges and subjecting appointed judges to voter recall. Subjecting judges to voter approval may be one way to deal with judicial abuses, but it also undermines the independence of the judiciary, especially in high profile cases—as is usually the case with child sexual abuse.¹⁶⁴ Judges subject to the ballot box are subject to the visceral responses of the uninformed masses, responses often fanned by the political aspirations of a prosecutor and/or a media more interested in sensationalism than journalism.¹⁶⁵ The chances of the court keeping the evidence out were slim to none. A few courts have,¹⁶⁶ but not most.¹⁶⁷ It didn't look good.

It only took a few days for the court to rule on the motion *in limine*. On the face of it, the ruling looked “King Solomon-like,”¹⁶⁸ appearing to give something to the prosecution and something to the defense. Like the general rules of evidence and exceptions which applied to the issue, however, while the court's order *looked* very fair and balanced, the practical effect was not. The court ruled that the prosecution could not use the prior conviction substantively to prove that

where respected, sitting justices were voted out of office because they were perceived to be soft on crime).

164. See Maura Anne Schoshinski, Note, *Towards an Independent, Fair, and Competent Judiciary: An Argument for Improving Judicial Elections*, 7 GEO. J. LEGAL ETHICS 839, 840 (1994) (“Judicial independence has been compromised by the need of judges to rely on financial, political, and public support.”). Judges themselves admit that elections have compromised their independence. See *id.* at 841-42. Sexual abuse cases are usually high profile cases because the prosecution often uses the media in an attempt to encourage additional victims to come forward. See *supra* note 7.

165. See Schoshinski, *supra* note 164, at 843-44 (noting that public opinion affects judicial independence because the public often casts their vote on single issues or decisions). “[C]ampaign contributions and public opinion pressure of judicial elections make it impossible for judges to remain independent.” Schoshinski, *supra* note 164, at 850.

166. The cases which have denied admitting the evidence of the prior acts of sexual misconduct generally either predate the adoption of Rule 414 of the Federal Rules of Evidence (or its state equivalent) or are in jurisdictions which have not followed the legislative trend. See, e.g., *Lovely v. United States*, 169 F.2d 386, 390 (4th Cir. 1948); *Freeman v. State*, 486 P.2d 967, 977-79 (Alaska 1971); *State v. Salazar*, 887 P.2d 617 (Ariz. Ct. App. 1994); *People v. Kelly*, 424 P.2d 947, 954-57 (Cal. 1967); *State v. Moore*, 278 So. 2d 781 (Fla. 1974); *State v. Curry*, 330 N.E.2d 720, 723-26 (Ohio 1975); *State v. Filuminia*, 668 A.2d 336 (R.I. 1995); *State v. Rickman*, 876 S.W.2d 824, 830 (Tenn. 1994).

167. See *United States v. Meacham*, 115 F.3d 1488 (10th. Cir. 1997); *United States v. Larson*, 112 F.3d 600 (2d. Cir. 1997); *supra* note 128.

168. “Solomon-like” rulings refer to the wisdom of splitting the argued-over prize in half. See 1 *Kings* 3:16-28. King Solomon, when confronted with two women who both claimed motherhood of a certain baby boy, ruled that the baby be split in half. *Id.* Of course, then, the woman whose boy it truly was relinquished her claim to the boy rather than see him die. *Id.* In this way, King Solomon was praised for his wisdom in determining who was the true mother. *Id.*

Ziggy committed the acts underlying the new charge. The prosecution could, however, put the victim from the first case on the stand and have the boy testify about the facts underlying the charge to which Ziggy pled guilty.¹⁶⁹ Arguably, we had prevailed on the first issue. We still had a fighting chance. That chance, however, was undermined by the court's ruling that if Ziggy took the stand, the prosecution could use the prior conviction to impeach his credibility.

Although we had control over whether the jury learned of Ziggy's prior conviction, the game was set up so that either way we were sure to lose.¹⁷⁰ If Ziggy took the stand, the prosecution would use the prior conviction to impeach his credibility. Once the jury heard that Ziggy had been previously convicted of engaging in sexual misconduct with a minor, the case would be over despite the court's limiting instruction.¹⁷¹ If Ziggy didn't take the stand, the jury wouldn't

169. This was the consistent approach to prior bad acts testimony in the early 1980's. See generally James Gold, *Sanitizing Prior Conviction Impeachment Evidence to Reduce its Prejudicial Effects*, 27 ARIZ. L. REV. 690, 699 (1985). In addition, with the advent of "lustful disposition exceptions" and new Federal Rules 413 and 414, the approach has changed to allow the evidence to prove propensity to commit the crime. See generally Kyl, *supra* note 110. It is unclear whether FED. R. EVID. 414 permits admission of the conviction *per se*, or only evidence of the underlying facts. The express language of Rule 414 is ambiguous, and to date, no court has addressed the issue. See FED. R. EVID. 414(a) ("In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible . . .") (emphasis added). In light of the prejudicial effect of the conviction, see *supra* notes 106, 155, the courts might require that the admissible evidence not include evidence of the conviction *per se*, at least where evidence of the underlying facts is available.

170. See Katherine Lewis Brock, *Impeachment by Prior Convictions: Procedural Problems, Substantive Dilemmas, and Constitutional Infirmitities*, 4 CRIM. JUST. J. 223, 223 (1980) (stating that potential damage to a defendant from admitting prior convictions for impeachment purposes will directly influence his decision not to testify, yet "even more prejudicial may be a decision not to take the stand, for juries are likely to infer the defendant has something to hide and must be guilty"). See generally Hornstein, *supra* note 42 (exploring the chilling consequences that introduction of prior convictions for impeachment purposes has on a defendant's right to testify).

171. The inefficiency of limiting instructions is notorious. In cases admitting evidence under Federal Rule 609 or a state counterpart, the jury is instructed to consider the prior conviction evidence in determining the veracity of the defendant's testimony, but not to use it as "an independent piece of information entering into the verdict." See Wissler & Saks, *supra* note 155, at 38. Empirical research suggests that the admission of prior convictions increases the likelihood of conviction, regardless of the limiting instructions given. See Wissler & Saks, *supra* note 155, at 38. In one study, when evidence of prior convictions for the same crime was introduced for impeachment purposes, there was a significantly higher conviction rate than when the prior conviction was for perjury or a dissimilar crime. See Wissler & Saks, *supra* note 155, at 41-42. Many attorneys and judges agree that jurors cannot separate such evidence "according to its permissible uses." See Hornstein, *supra* note 42, at 4 n.11; see also Gold, *supra* <https://scholarship.law.missouri.edu/mlr/vol64/iss2/2>

hear about his prior conviction, but they wouldn't hear his side of the story either.¹⁷² The jury would hear day after day of damaging testimony, with no rebuttal from Ziggy. If that weren't bad enough, no doubt the jury would infer that Ziggy's failure to testify meant he had something to hide. But he couldn't take the stand. If he did, the prosecution would use the prior plea bargained conviction to impeach his credibility, thereby destroying any rebuttal he might offer. While juries tend to believe an adult's word over that of a child, or even several children,¹⁷³ that assumes the jury has heard the adult's side of the story. The cumulative effect of the kids' testimony and Ziggy's inability to testify didn't look good.¹⁷⁴ Ziggy was damned if he testified and damned if he didn't.¹⁷⁵ All because we plea bargained the first case just to put it behind us.

The more I thought about it, the more ironic it seemed. We (well, at least I) plea bargained the first charge to give Ziggy a second chance, and to spare the boy in the first case the trauma of having to testify in court.¹⁷⁶ Yet, the effect had turned out to be the exact opposite. The plea bargain cost Ziggy his second chance by resurrecting new allegations, and the boy was going to have to testify in court anyway.

The irony of the situation was only exacerbated when I realized that the plea bargain not only cost Ziggy his second chance, it was looking more and more like it would also cost him his day in court.¹⁷⁷ Granted, I could put Ziggy on the stand and try to have him explain to the jury that the prior conviction was

note 169, at 692 (noting that critics contend that introduction of evidence of prior convictions for impeachment purposes creates a substantial likelihood of prejudice and proves little about the defendant's veracity as a witness).

172. See generally Hornstein, *supra* note 42 (querying whether the possibility of impeachment by prior conviction effectively denies the defendant's constitutional right to testify in his own defense).

173. See Lynne Henderson, *Without Narrative: Child Sexual Abuse*, 4 VA. J. SOC. POL'Y & L. 479, 523 (1997) (noting that the belief that juries will believe children over adults is "unfounded") (citing Stephen J. Ceci & Maggie Bruck, *Child Witnesses: Translating Research into Policy*, Society for Research in Child Development, XX SOCIAL POL'Y REP. No. X (1993) ("[J]urors may disbelieve older children . . .")); see also *supra* notes 100, 102-03 and accompanying text.

174. Commentators argue that juries draw an "inference of guilt from the silence of the accused." See MCCORMICK, *supra* note 119, § 43, at 99 (noting that if a defendant "stays off the stand, his silence alone will prompt the jury to believe him guilty"); Note, *To Take the Stand or Not to Take the Stand: The Dilemma of the Defendant with a Criminal Record*, 4 COLUM. J.L. & SOC. PROBS. 214 (1968); see also *supra* note 101 (noting the effect of multiple charges as opposed to single charge).

175. See *supra* notes 170-74 and accompanying text. See generally Gainor, *supra* note 160; Tim Poor, "Nearly Identical" Crimes Allowed in Trials, ST. LOUIS POST-DISPATCH, July 30, 1991, at 1C ("Sometimes, just the threat of using evidence of prior crimes can change defense strategy.").

176. See *supra* notes 42-51 and accompanying text.

177. See generally Brock, *supra* note 170; Hornstein, *supra* note 42.

a "plea bargained" conviction, not a real conviction; but good luck explaining to a group of people who have never been charged with any crime, much less a crime as despicable as child sexual abuse, why you might admit to a crime you didn't actually commit, especially a crime as heinous as child sexual abuse.¹⁷⁸ No, with the number of complainants and the number of counts in the second case, if the jury learned about his prior conviction, there was no way we were going to overcome the presumption that he was guilty.¹⁷⁹ We had to keep the jury from learning of his prior conviction. Ziggy couldn't take the stand. The plea bargain had deprived him of that right.¹⁸⁰

While Ziggy couldn't take the stand, the boy from the first case would have to. Although the court's ruling barred the prosecution from using Ziggy's plea bargained conviction in the prior case to prove that Ziggy had committed the acts in the second case, the ruling permitted the prosecution to present evidence of other child sexual abuse by Ziggy besides the abuse alleged by the complainants.¹⁸¹ In light of the *McMartin* case, one more child witness did not necessarily doom Ziggy, if he were able to take the stand.¹⁸² Without the benefit of his own testimony, however, Ziggy's chances looked bleak. Our only hope was to poke some holes in the kids' testimony or find some other way to impeach their credibility.

178. See *supra* notes 121-24 and accompanying text.

179. See *supra* notes 27, 63, 101, 106, 110, 121-24 and accompanying text.

180. See Gainor, *supra* note 160, at 763-64.

A criminal defendant whose record includes conviction of a felony not involving "dishonesty or false statement" may ask the court to exclude the prior conviction evidence. Often, the request is refused, and the defendant is left with only one means of keeping knowledge of the previous crime from the jury—he can decline to testify in his own defense, even though his decision may mean presenting virtually no defense at all, as well as enduring the nearly inevitable inference that he is guilty. Frequently, a federal jury makes its decision on the guilt or innocence of a criminal defendant without ever having heard the defendant's own story.

Gainor, *supra* note 160, at 763-64. See also Comment, *To Take the Stand or Not to Take the Stand: The Dilemma of the Defendant with a Criminal Record*, 4 COLUM. J.L. & SOC. PROBS. 215 (1968).

181. For all practical purposes, the court treated the prior plea bargained conviction like uncharged sexual misconduct. The prior misconduct sought to be introduced typically does not even need to constitute a crime. See Edward J. Imwinkelried, *Uncharged Misconduct*, CRIM. J., Summer 1986, at 8 (asserting that, although some scholars assert that only evidence of crimes may be introduced, such a requirement would be nonsensical). For a discussion of the admissibility rules governing both charged and uncharged misconduct evidence, see McCandless, *supra* note 145; Segal, *supra* note 16.

182. In *McMartin*, the defendants were faced with 124 witnesses, but were ultimately acquitted. *McMartin Jury Deadlocks; Buckley Won't Be Retried Mistrial*, L.A. TIMES, July 29, 1990, at A1.

I didn't like our chances. Although I had some reasons to doubt the kids' testimony, I didn't have any effective way to plant doubt in the jurors' minds. I had learned that one of the kids who was going to testify against Ziggy had been kicked off the team for drinking and drug abuse.¹⁸³ The kid was really upset with Ziggy because the kid thought it had cost him a college soccer scholarship. Revenge is a powerful motive—one that might plant a seed of doubt in the jury's mind. And Ziggy told me that another one of the kids who was going to testify had called him shortly after the first charge was plea bargained and demanded twenty thousand dollars, or he was going to make up a charge and go to the police.¹⁸⁴ Ziggy had refused to pay. Greed is another powerful motive that can create doubt in the jury's mind. The problem was, without Ziggy's testimony, I didn't know how I was going to raise the possible improper motives. I could ask the kids about the allegations during cross-examination,¹⁸⁵ but without any witness to testify positively to the possible motives, I didn't really think it would have much effect upon the jury. The plea bargained conviction was killing us.

As I feared, the trial was rather anti-climatic. It lasted seven days. Seven days of excruciating testimony as the boys painfully recounted one alleged act of deviate sex after another. On cross-examination, I did ask two of them if they might have had ulterior motives for testifying against Ziggy. But I could tell that

183. *Missouri v. Muthofer*, 731 S.W.2d 504 (Mo. Ct. App. 1987).

184. *Id.*

185. Generally, child witnesses may be cross-examined about their motive for testifying; however, some difficulties unique to child witnesses may arise. See Kermit v. Lipez, *The Child Witness in Sexual Abuse Cases in Maine: Presentation, Impeachment, and Controversy*, 42 ME. L. REV. 283, 329 (1990). While evidence of the child witness's reputation for either truthfulness or untruthfulness is admissible under rules of evidence modeled after the federal rules, young children have typically not developed such a reputation. See *id.* at 325. Generally, however, the right of the defendant to cross-examine witnesses about their motive for testifying is regarded as fundamental. Trial court refusals to allow such cross-examination have often been held prejudicial or reversible error. See, e.g., *State v. White*, 551 P.2d 1344 (holding that trial court erred in disallowing the cross-examination of a complaining witness in which defense counsel sought to explore possible reasons that the complainant may have falsely accused the accused, where the child's relationship with her family was strained and the cross-examination pertained to explaining the variance between stories told by the witness and the accused), *cert. denied*, 429 U.S. 842 (1976); *Woods v. State*, 657 P.2d 180 (Okla. Crim. App. 1983), *overruled by Beck v. State*, 824 P.2d 385 (Okla. Crim. App. 1991) (finding prejudicial error where cross-examination was denied which would have explored the possibility that the complaining witness had brought charges of incest against her father in retaliation for his refusal to give consent to her fiancé to marry her); *People v. Kadel*, 160 N.Y.S. 817 (App. Div. 1916) (holding that the defense should have been allowed to cross-examine the complaining witness in order to show that her testimony was motivated by feelings of resentment toward the accused for bringing legal action against her brother).

without any supporting testimony, the jury seemed more irritated than impressed with what must have appeared to them to be scurrilous and baseless attacks on the boys' credibility.¹⁸⁶

As painful as the trial was, the worst part was the prosecutor's daily media debriefing/political campaigning.¹⁸⁷ If Ziggy were guilty, the trial was a necessary evil, and I felt sorry for the pain and anguish that the boys appeared to be suffering as they testified. It was, however, unseemly the way the prosecutor sought political gain from such a sordid affair. Although the case was not televised, the prosecutor knew that detailed accounts of the day's proceedings were being reported on the evening news and in the next day's papers. From a political perspective, there couldn't be a better case for the prosecutor to cast himself as the "law and order" kind of guy who would protect our children and traditional family values.¹⁸⁸ It didn't take a rocket scientist to discern the message the prosecution was sending to the voters: this prosecutor is such a great guy he shouldn't be stuck in his low level county prosecutor position, he should be County Supervisor. Poor Ziggy, he didn't stand a chance. The prosecutor's closing argument still rings in my ears. In an emotional plea to the jury, he argued that Ziggy "should burn in hell!"¹⁸⁹

It didn't take the jury long to find him guilty, guilty on all twenty-five counts. The prosecution recommended the maximum sentence, and the court agreed. Although the court couldn't sentence Ziggy to hell, it did what it could, sentencing him to 185 years in prison.¹⁹⁰

Ziggy got what amounted to life in prison; yet, he never got his day in court, he never got his chance to tell his side of the story. And why? All because he pled guilty to one relatively minor charge of sexual misconduct because we thought that in doing so he could put the matter behind him and get on with his life.¹⁹¹ I'm not saying that Ziggy would not have been convicted if permitted to testify without the prosecution being able to use the plea bargained conviction to impeach his credibility, but at least Ziggy would have had his day in court—his chance to tell his side of the story.

186. See CRIMINAL DEFENSE TECHNIQUES, *supra* note 16, § 78A.03(2) (stating that "jurors will not look favorably upon defense counsel who badgers a young witness").

187. See Fitzpatrick, *supra* note 36, at 203 ("While some states have barred the press from the courtroom while victims of sexual abuse are testifying, no such protection to the defendant exists."). For a general review of the negative impact of media on the defendant in a sexual abuse case, see Willis, *supra* note 124, at 55. See also *supra* notes 70, 72 (discussing generally the prosecutor's duties in dealing with the press).

188. See *supra* notes 70, 72 and accompanying text.

189. Catherina Vesperany, *Soccer Coach Found Guilty of Sex Abuse Charges*, ST. LOUIS POST-DISPATCH, May 17, 1986, at 3A.

190. *Regional News, Clayton, Mo.*, UPI, July 18, 1986, available in LEXIS, Nexis Library, UPI File.

191. See *supra* notes 38-44 and accompanying text.

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I wasn't that surprised by the jury's verdict, or the sentence the court imposed. Once I realized the case was going to trial, I knew our best chance would be on appeal. The alleged facts of our case were admittedly sordid, and without Ziggy's testimony, the facts favored the prosecution. On appeal, however, the focus would shift to the trial court's rulings on the use of Ziggy's plea bargained conviction,¹⁹² a question of law on which we at least had some arguments. Removed from the emotionally charged context of the trial, I hoped that the court of appeals would see our side of the argument.

I argued on appeal that the trial court erred in permitting the prosecution to introduce evidence that Ziggy sexually abused boys other than the complainants and that the trial court erred in ruling that the prosecution could use Ziggy's prior conviction to impeach his credibility if he took the witness stand. I repeated the arguments I had made at the trial court level. In particular, I focused on the prejudicial effect of such evidence and how the prejudicial effect greatly outweighed any possible probative value.¹⁹³

As was the case with the trial court, however, my arguments fell on "deaf ears" (or maybe it would be more accurate to say "closed minds"). The court of appeals upheld the trial court's rulings. I wasn't particularly surprised by the court's ruling, but I was disappointed in the court's opinion. Instead of focusing on the question of law raised by the appeal, the court focused on the underlying facts. After an extended and detailed statement of the alleged atrocities,¹⁹⁴ the court turned to the critical issue of the prejudicial effect versus the probative value. The court's analysis of the issue, however, is conspicuous by its absence.¹⁹⁵ The court never addressed the issue. Instead, the court simply asserted that the defendant's claims of potential prejudicial effect were mere "assumptions made without any factual substance and we [the court of appeals] need not respond to defendant's speculations."¹⁹⁶

Assumptions? Speculations? *Hello?* Not only is the prejudicial effect of the prior sexual misconduct evidence self-evident, it is well documented.¹⁹⁷ Rather than dealing with the tough issue in the case, however, the court punted. The court went on to give all the appearances of applying and analyzing the rules with respect to the prosecution using evidence of prior sexual misconduct. The

192. See generally Ronald R. Hofer, *Standards of Review — Looking Beyond the Labels*, 74 MARQ. L. REV. 231, 233 (1991) ("Factual findings of the trial court will not be overturned unless clearly erroneous. 'The appellate court may determine questions of law independently with no deference to the conclusions reached by the trial court.'") (quoting *In re Marriage of Levy*, 388 N.W.2d 170, 172-73 (1986)).

193. See *supra* notes 131-58 and accompanying text.

194. See, e.g., *Missouri v. Muthofer*, 731 S.W.2d 504, 505-07 (Mo. Ct. App. 1987).

195. *Id.* at 507-08.

196. *Id.*

197. See generally Fitzpatrick, *supra* note 36; Hornstein, *supra* note 42; Kyl, *supra* note 110; McCandless, *supra* note 145; Wissler & Saks, *supra* note 155.

court failed, however, to address the most important element—whether the probative value outweighed the prejudicial effect. The fiction continued unabated.

What is interesting about the court's opinion, however, is that while the court failed to address the critical issue head on, it gave a glimpse of its rationale when it ended with the following commentary:

The seeds of our permissive and promiscuous society sown in the last score of years are now coming to full bloom and their effects and fallout are painfully being felt at an ever exceedingly rapid pace. While morals and mores may change, our elected representatives have found it necessary and appropriate to limit such lifestyles. These limitations are absolutely essential in any society to protect and preserve society's most valuable resource . . . [sic] our young children. To those who choose to deviate from the accepted standards of our civilized society, they must endure severe consequences and we affirm the judgment below.¹⁹⁸

Ziggy's prior conviction, coupled with the twenty-five new charges and other uncharged allegations, apparently had convinced the court of appeals that Ziggy was guilty, so there was no need to sweat the legal issue of the prosecution's use of his plea bargained conviction. Society needs to protect and preserve its most valuable resource—its young children—even if it means bending, if not breaking, a few rules. The end justifies the means.

The state supreme court denied my petition for certiorari without comment.

As I look back on Ziggy's case, I can't help but think that something went wrong somewhere. Here's a guy sentenced to 185 years in prison, basically life in prison, and yet he never got the chance to take the stand and testify in his own defense. He never got to tell his side of the story. Granted, it was his decision not to take the stand in the second case. His decision, however, was dictated by the fact that if he had taken the stand, the prosecution would have used the plea bargained conviction from the first case to impeach his credibility. Let's be honest—no jury was going to limit its knowledge of such evidence to assessing his credibility.¹⁹⁹ If the jury had learned of his prior conviction, the second case would have been over. No, the keys were (1) his decision to accept the plea bargain in the first case, and (2) the trial court's ruling that if Ziggy took the stand to testify, the prosecution could use the prior conviction to impeach his credibility. Either (1) I made a mistake in recommending the plea bargain, or (2) the trial court made a mistake in ruling that the prosecution could use the conviction to impeach his credibility if Ziggy took the stand. In cases prosecuting sexual offenses, given the courts' habit of admitting evidence of the

198. *Muthofer*, 731 S.W.2d at 510.

199. See *supra* notes 63, 106, 109, 155 and accompanying text.

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defendant's prior sexual misconduct²⁰⁰ and of permitting the use of the prior conviction to impeach the defendant's credibility if the defendant takes the stand,²⁰¹ by matter of elimination it looked like the mistake was mine for recommending that Ziggy plead guilty to the first charge.

Did I make a mistake in recommending the initial plea bargain to Ziggy? To this day, I ask myself that question. At the time, it looked like a fairly easy decision—a textbook scenario. We followed the classic formula for assessing plea bargains. We compared the costs of going to trial (the probability of a conviction times the likely punishment, plus the direct and indirect costs of the trial) versus the costs of the plea bargain (the terms of the plea bargain).²⁰² While the chances of Ziggy being convicted were probably less than fifty-fifty, with the public paranoia over child sexual abuse, who knew what a jury might do? And if convicted, the public outrage over sexual offenses involving children meant that he probably would have spent years in prison.²⁰³ Even if acquitted, any trial would have hurt Ziggy and probably would have killed the Kickers Soccer Club.²⁰⁴

In contrast to the uncertainties surrounding going to trial, the plea bargain appeared to offer an acceptable resolution of the matter with minimal adverse consequences. There would be no prison time and only three years probation as long as he agreed to receive psychological counseling. And he could continue to coach soccer as long as another parent was present at all times.²⁰⁵

At the time, the decision to accept the plea bargain appeared to be “a no-brainer.” The risks of going to trial seemed to substantially outweigh the costs inherent in the proposed plea bargain. The problem is the classic formula for assessing plea bargains fails to take into account the risk of the reluctant complainant. The formula assumes that victims of crimes have an incentive to come forward and press charges and will do so in a timely manner, especially when the victim knows the identity of the perpetrator. These incentives range

200. See *United States v. Meacham*, 115 F.3d 1488 (10th Cir. 1997); *United States v. Larson*, 112 F.3d 600 (2d Cir. 1997); *supra* note 128.

201. See *United States v. Valencia*, 61 F.3d 616, 618-19 (8th Cir. 1995) (recognizing that the court's balancing the probative value versus the prejudicial effect is less stringent under FED. R. EVID. 609 than it is under FED. R. EVID. 404(b)); *supra* note 160; see also WEINSTEIN, *supra* note 116, § 609.04(2)(a)(i), at 609-19.

202. See POSNER, *supra*, note 22, § 21.5; Hollander-Blumoff, *supra* note 22, at 122 (citing to a defense attorney who states the cost of trial portion of the formula as “the minimum penalty [if convicted] at trial, and the strength of the government's case”). Of course, legal analysts recognize that the “costs” of the plea bargain may include more than its sentencing terms. See BNA CRIMINAL PRACTICE MANUAL, *supra* note 31, § 71:105 (recognizing “[f]uture use of conviction for impeachment” as a factor that should be considered in making the decision to accept a plea bargain).

203. See *supra* notes 6, 24-26 and accompanying text.

204. See *supra* notes 24, 27, 41 and accompanying text.

205. See *supra* notes 33-34 and accompanying text.

from personal revenge to fulfilling a sense of civic duty.²⁰⁶ For many, if not most, victims of child sexual abuse, however, these incentives are not enough.²⁰⁷ The fear, the embarrassment, and the trauma the child suffers in coming forward and pressing charges outweigh any benefits to the child, at least until they get older.²⁰⁸ The problem of the reluctant complainant is well documented in the context of *enforcing* child sexual abuse laws²⁰⁹ (the problem from society's perspective), but nobody put one and one together to recognize the problems the reluctant complainant creates for the classic plea bargaining analysis formula (the problem from the defendant's perspective). Because I didn't put one and one together and the prosecution did, it turned out that for Ziggy, $1 + 1 = 185$: 185 years in prison, that is.

Should I have foreseen the risk of the reluctant complainant? I've asked myself that question a thousand times. When considering the proposed plea bargain, I advised Ziggy the prosecution could probably use the plea bargained conviction against him if he got in trouble again in the future,²¹⁰ but I didn't go into all the details. Both of us assumed that "if he got in trouble again" meant if he got in trouble for something he did *in the future*. Neither of us considered the risk that he might get in trouble in the future but for something he did *in the past*. We knew the prosecution had questioned each and every kid who had ever played soccer for him, the most likely victims, and all of them denied that Ziggy had ever done anything to them. The initial charge received enough publicity that if there were any more victims out there, they would have come forward, or so I thought. When no other victims came forward, I assumed there were no more victims out there; I assumed we were safe plea bargaining. Boy was I wrong.

But if I couldn't recommend the plea bargain to Ziggy under those circumstances, when, if ever, should a defense attorney recommend a plea

206. See Peter Wendel, *A Law and Economics Analysis of the Right to Face-to-Face Confrontation Post-Maryland v. Craig: Distinguishing the Forest From the Trees*, 22 HOF. L. REV. 405, 481-82 (1993). Wendel states:

In theory, and for the most part in practice, the benefits to victims of crime who come forward, report the crimes, and participate in the prosecution process generally do exceed the costs. Among the principal benefits are feelings of fulfilling one's civic duty and revenge. Although these benefits are intangible, that does not make them any less real or valuable.

Id.

207. See *supra* notes 10, 78.

208. See Sopher, *supra* note 6, at 652 n.142 (noting that "fear and confusion cause many children to delay, or even forego, reporting sexual abuse"); see also *supra* notes 10, 76-77 and accompanying text. In addition, for a discussion of the factors causing many victims not to come forward, see *supra* notes 18, 49-51, 84.

209. See *supra* notes 10, 76-78.

210. BNA CRIMINAL PRACTICE MANUAL, *supra* note 31, § 71:05-06 (including among the factors an attorney should consider in assessing a plea bargain the future use of the plea bargained conviction against the defendant).

bargain to a client charged with child sexual abuse? That's the question which has been nagging me, and that's the question which leads me to conclude that justice was not served, even if Ziggy is guilty! Don't get me wrong. If Ziggy sexually abused the kids, he deserves to be punished—and severely. In our rush “to protect and preserve society's most valuable resource . . . our young children,” however, we need to be careful not to fall into “the ends justifies the means” mentality;²¹¹ we need to be careful that the steps we take to protect our children don't come back to haunt them.

If defense attorneys are not safe in assuming that there are no other victims out there under the facts in Ziggy's case, defense attorneys are never safe in assuming that there are no other victims out there. Yet, if that is true, once you combine (1) the risk of the reluctant complainant, with (2) the obvious prejudicial effect of the prior conviction, and (3) the prevailing judicial approach permitting the prior plea bargained conviction to be used both substantively and to impeach the defendant's credibility in any subsequent case, whether the facts pre-date or post-date the plea bargain, you realize that if any other complainants come forward, the defendant will be screwed. The defendant will have no defense to the charges and will receive the maximum sentence.

The bottom line is that if defense attorneys and defendants fully appreciated the risks they are taking when plea bargaining child sexual abuse cases, they would *rarely, if ever*, plea bargain such cases. In our emotional and righteous rush to convict defendants whom we are convinced are guilty of child abuse, the courts and legislatures have failed to consider the chilling effect their rulings will have on other defendants charged with child sexual abuse, especially cases involving a single complainant.²¹²

Yet as a society, don't we have a duty to mitigate the harm to victims of child abuse? Child abuse is a sickening crime. There is no doubt about that. For most victims of child sexual abuse, however, the greatest trauma aside from the crime itself is the trauma associated with having to testify about it.²¹³

211. Making it easier to win individual battles by convicting accused child molesters could backfire on prosecutors in the greater war against child sexual abuse. See WIGMORE, *supra* note 110, § 5412(A) (warning that relaxed evidentiary requirements against suspected child molesters could result in “an increase in juror distrust of the testimony of victims who are not corroborated by other accusations”).

212. In *United States v. Salerno*, 481 U.S. 739, 767 (1987) (Marshall, J., dissenting), Justice Marshall noted:

Honoring the presumption of innocence is often difficult; sometimes we must pay substantial social costs as a result of our commitment to the values we espouse. But at the end of the day the presumption of innocence protects the innocent; the shortcuts we take with those whom we believe to be guilty injure only those wrongfully accused and, ultimately, ourselves.

Id.

213. See Brannon, *supra* note 10, at 442-44 (noting that confronting their abuser is the single greatest trauma to the child); see also Nuce, *supra* note 15, at 608 (noting that in a study of child witnesses of sexual abuse, if they testified 73% experienced

Testifying about the abuse and being subjected to cross-examination are inherently intrusive and traumatic experiences²¹⁴ that merely re-open wounds which time and self-repression have closed to some degree.²¹⁵ It is precisely that trauma which makes many victims reluctant complainants.²¹⁶ If defendants in child sexual abuse cases start refusing to plea bargain, more victims of child abuse will be forced to endure the trauma of testifying, which in turn will make it less likely the victims will come forward. You can see the domino effect beginning. The less likely victims are to come forward, the more harm the predators can inflict upon victims and other children not yet victimized. The starting point to stopping the cycle of sexual abuse is to get victims to come forward.

The potential problem is only magnified when one remembers that although child molesters typically molest multiple victims, the norm is for a single victim to come forward.²¹⁷ The lone victim who comes forward typically is a reluctant complainant—scared and humiliated. Just as with the original case against Ziggy, typically there is no corroborating physical evidence.²¹⁸ In such a case, society should want the defendant to plea bargain for two reasons. First, and arguably foremost, “to protect and preserve society’s most valuable resource . . . our young children.”²¹⁹ Plea bargaining saves the victim from the well-documented further abuse of having to publicly relive their nightmare and of being subjected to humiliating and often oppressive cross-examination.²²⁰ Second, even if the child were to testify, since typically there is no independent corroborating evidence, the chances of conviction are fifty-fifty at best. Most juries tend to believe the word of an adult over the word of the child, particularly when the child exhibits difficulty testifying. Juries have trouble distinguishing the child’s reluctance to testify because of the trauma of having to relive the abuse from a reluctance to testify because the child is making it up. Faced with this dilemma, coupled with the heightened “beyond a reasonable doubt” burden of proof, most juries tend to acquit the defendant in such cases.²²¹

behavioral problems; but if they did not testify, only 57% had behavioral problems); *supra* notes 18, 49-51, 84.

214. *See supra* notes 18, 49-51 and accompanying text.

215. *See supra* notes 76-77 and accompanying text.

216. *See supra* notes 10, 78.

217. While there are, of course, exceptions to this general rule such as highly publicized cases such as the *McMartin* trials, *see supra* note 104, most cases really do come down to a “swearing match” between a lone child complainant and the accused. *See supra* notes 15-16 and accompanying text.

218. *See supra* note 29.

219. *Missouri v. Muthofer*, 731 S.W.2d 504, 510 (Mo. Ct. App. 1987).

220. *See BURGESS ET AL.*, *supra* note 9, at 205 (listing among the factors contributing to the child’s trauma at trial that the child is subject to cross-examination and doubt concerning his accusations); *see also supra* notes 49-51, 84.

221. *See Sopher*, *supra* note 6, at 633-44 (stating that “the only evidence usually

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In the typical child abuse case then, with a single complainant, the optimal result is a plea bargained conviction. The plea bargain saves the young victim from the trauma of having to testify, avoids the risk of the jury acquitting the defendant, gets the defendant into counseling, puts conditions on his or her access to vulnerable children (thereby greatly reducing his or her ability to abuse any more children), and provides a record so that if the defendant does abuse another child in the future, it greatly facilitates prosecution. From the defendant's perspective, the plea bargain may be an acceptable compromise if it permits him or her to put the incident behind the defendant, without too much exposure. As long as the defendant is in control of the consequences of the plea bargain, the defendant will be more open to plea bargaining. The defendant is in control of the consequences, however, only if the plea bargained conviction can be used in subsequent cases only where the alleged facts *post-date* the plea bargained conviction. If the plea bargained conviction can be used in cases where the alleged facts *pre-date* the plea bargain, the defendant would be crazy to take that risk. For all practical purposes the defendant would be waiving his or her defense in any subsequent case that might be brought,²²² and the defendant would be playing Russian roulette with respect to whether additional claims might be brought. It makes no sense to agree to a plea under such circumstances.²²³

The solution seemed obvious. In child sexual abuse cases, when subsequent charges arise out of acts committed *prior* to the plea bargain, we need to accord the defendant special consideration and bar use of prior plea bargained convictions either to prove that the defendant committed the newly alleged acts or to impeach the defendant's credibility. I can understand using a prior conviction to impeach the credibility of a defendant who goes out and thereafter gets him or herself into trouble again with the law, but using a prior conviction to impeach the credibility of a defendant in a subsequent case based on allegations which *pre-date* the prior conviction—that is an entirely different matter, and one which the court refused to address in Ziggy's case. If defendants and defense attorneys in child sexual abuse cases fully appreciated the risk of the reluctant complainant, they would not be interested in plea bargaining unless they had control over whether the plea bargained conviction might be used against them in subsequent cases when the underlying allegations pre-date the plea bargain.

No doubt prosecutors and other "law and order" types will argue there is no need for my proposed rule because there already exist mechanisms for achieving the same result. As part of the plea bargaining process, defense attorneys can try

comes from the child, whose ability to communicate effectively may be hampered by several factors"); see also *supra* notes 100, 102-03.

222. See *supra* note 180.

223. See Richman, *supra* note 81 (discussing the dangers of pleading guilty with the possibility of more charges hanging over the defendant's head).

to negotiate a deal whereby the plea bargained conviction could not be used in any subsequent child abuse case if the underlying acts pre-date the plea bargain.²²⁴ The problem with that argument is it assumes defense attorneys know enough to condition the plea. Unfortunately, they don't. I've often wondered why they don't. The problem of the reluctant complainant and plea bargaining child sexual abuse cases seemed so obvious in retrospect. The oversight is probably a function of our societal attitude toward the crime of child sexual abuse and those who commit it. Defendants charged with child sexual abuse are treated as pariahs by our society²²⁵ and our legal system.²²⁶ You never hear of an attorney who "specializes" in defending child molesters. You never hear of a conference on the latest strategies for defending accused child molesters. I'd venture to guess that you can count on one hand the number of attorneys who have defended more than one case of child sexual abuse. The distaste for the subject matter, the distaste for the client, the distaste for the way the judicial system treats these defendants, and the silent but quite real distaste society has for attorneys who represent defendants charged with child sexual abuse insures that few attorneys handle more than one such case and that no attorney bothers to write about his or her experiences. For each new case, the defense counsel's learning curve starts from scratch, and there's nothing out there to alert a conscientious attorney to the problem.

And even if defense attorneys knew to negotiate that the plea bargain was conditioned on it not being admissible in any subsequent case when the alleged sexual misconduct pre-dated the plea, prosecutors wouldn't agree to such a condition. Child molesters pose a great danger to the community. Prosecutors want every available weapon to use against those accused of child sexual abuse. One of the most potent weapons is the admissibility of prior convictions in subsequent cases. The prosecution's practice of plea bargaining the overwhelming majority of child sexual abuse cases could be characterized as the "one molestation" rule. Because of the difficulty the prosecution faces convincing a jury beyond a reasonable doubt that the defendant sexually abused the child,²²⁷ and to avoid the trauma a trial would inflict upon the child,²²⁸ many prosecutors plea bargain single complainant charges against a defendant on terms favorable to the defendant²²⁹ just to get a conviction against the defendant. The prosecution knows that if thereafter any other complainants come forward, the prosecution can immediately seek to revoke the defendant's probation and

224. The prevailing view is that plea bargains are considered contracts between the prosecution and the defendant. See Eric Rasmusen, *Mezzanatto and the Economics of Self-Incrimination*, 19 CARDOZO L. REV. 1541, 1548 (1998); see generally Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L. J. 1909 (1992).

225. See *supra* notes 1, 24, 27, 37.

226. See *supra* notes 63, 69, 122-25.

227. See *supra* notes 15, 29, 100, 102-03, 173.

228. See *supra* notes 10, 18, 49-51, 78, 84, 221-22.

229. See *supra* note 34.

secure a conviction by coupling the new allegations with the prior conviction. Just like Ziggy, the defendant stands no chance in the second trial and can expect to receive the maximum sentence. If the prosecution could not use the plea bargained conviction in subsequent cases unless the underlying acts post-dated the plea, the prosecution would be hampered in its efforts to fight child sexual abuse. The prosecution is not likely to give up such a potent weapon.²³⁰ And there's always that "slippery slope" concern. Once prosecutors begin agreeing to such conditions for child abuse defendants, defense attorneys will want such a condition in all plea bargains. No, it's unlikely prosecutors would agree to such a condition.

Finally, although courts arguably already have the power to bar the subsequent use of the plea bargained conviction if the facts underlying the new charges pre-date the plea (the court could rule that the prejudicial effect substantially outweighs the probative value),²³¹ it would be a stretch to fit the reluctant complainant scenario into this doctrine. The prejudicial effect of admitting the plea bargained conviction is not just the effect it would have in that case, but the larger chilling effect it would have on other child abuse defendants considering plea bargaining. Moreover, since the trial court has great discretion in determining whether the prejudicial effect substantially outweighs the probative value,²³² the existing judicial authority to bar the use of the plea bargained conviction doesn't provide enough protection. It is all too easy for the court, either on its own²³³ or out of fear of public (voter) backlash,²³⁴ to get caught up in the anti-child-abuse hysteria. No, what child sexual abuse defendants need is a rule that the defendant can invoke which absolutely bars the use of the plea bargained conviction in subsequent child abuse cases arising out of acts committed prior to the plea bargain—it cannot be left to judicial discretion. Any other rule will only result in less plea bargaining in child sexual

230. There is anecdotal evidence to support this conclusion. Scott Van Camp, one of the students who helped research this Article, interned at the Orange County Public Defender's Office. He worked on a case where a teacher was facing nine counts of sexual misconduct arising out of allegations brought by one of his students, a teenage girl. The prosecution proposed a plea bargain where the defendant would plead guilty to one count, a felony, in exchange for probation and other minor conditions. After the Public Defender read a draft of this Article, he proposed including in the plea bargain a provision barring use of the plea bargain conviction in any subsequent sexual misconduct case against the defendant where the underlying facts predated the plea bargained conviction. The prosecution refused to consider any attempts at limiting the future use of the plea bargained conviction, saying it was against the District Attorney's office policy.

231. See *supra* notes 131, 151 and accompanying text.

232. See FED. R. EVID. 414; WEINSTEIN, *supra* note 116, § 414.04(2), at 404-32; see also FED. R. EVID. 609(a)(1).

233. See *supra* note 121.

234. See *supra* notes 163-65.

abuse cases, which in turn will produce greater trauma to child abuse victims and more child abusers free to continue molesting.

To this day, I don't know if Ziggy is guilty or not. I know the statistics. Most child abusers abuse more than one child.²³⁵ The chances that more than one child would allege child sexual abuse against the same adult are slim.²³⁶ The odds are particularly slim here, where the children were not really that young and not that susceptible to the power of undue suggestion from the police and prosecutors.²³⁷ But the facts of the first case still bother me, as do the possible motives of two of the boys in the second case. I just don't know.

While reflecting on the case, I happened upon a newspaper article which reported the outcome of another child sexual abuse case from another part of the country. The headline grabbed my attention, "Molester of 2 schoolgirls gets 10 years."²³⁸ I read on:

A former teaching aide at a Thousand Oaks private school has been sentenced to 10 years in state prison for molesting two 5-year-old girls who were enrolled in the man's classes.

Kenneth Charles Clark, 39, of Chatsworth was sentenced Monday in Ventura Superior Court following a trial where he was found guilty of committing a lewd act on one victim. Clark pleaded guilty last year to a similar offense involving the other victim.

The victims attended Hillcrest Christian School. Clark resigned from the school last year.

Judge Arturo Gutierrez followed the recommendation of Ventura County prosecutors and sentenced Clark to the maximum terms for the two offenses. He must serve eight years and six months before he is eligible for parole, said Deputy District Attorney Margaret Coyle.

235. See Reed, *supra* note 46, at 151 ("Pedophiles with prior child molestation convictions are more likely to repeat the act than a first-time offender."); see also Bund, *supra* note 8; *supra* notes 46, 144, 146.

236. See Beale, *supra* note 15, at 321. Beale states:

It is inherently improbable that a person whose prior acts show that he is in fact a rapist or child molester would have the bad luck to be later hit with a false accusation of committing the same type of crime, or that a person would fortuitously be subject to multiple false accusations by a number of different victims.

Beale, *supra* note 15, at 321; see also Warren, *supra* note 14, at 6 n.1 (quoting a renowned expert on incest, who stated that she had never heard of several children conspiring to make false accusations); *supra* note 52.

237. Most literature on the suggestibility of child witnesses in child sexual abuse cases focuses upon very young children. For examples of articles focusing on the suggestibility of children during investigations of child abuse, see Anderson, *supra* note 97; Brannon, *supra* note 10; Fitzpatrick, *supra* note 36.

238. *Molester of 2 Schoolgirls Gets 10 Years*, L.A. DAILY NEWS (Conejo Valley Ed.), Mar. 19, 1997, at A3.

Clark's public defender sought probation, contending Clark had no prior criminal record.

Coyle, however, said the defendant was a repeat offender who deserved the maximum sentence.

Clark pleaded guilty last spring to committing the lewd act on the first victim. The second victim came forward later, and Clark was convicted of the offense at a jury trial earlier this year where both victims testified.²³⁹

Although the newspaper article did not report the details of the case, the similarities between Ziggy's case and the reported case were uncanny. The original charge was brought by a single complainant—a scared, embarrassed, and not doubt traumatized young girl. No doubt the police and prosecutors questioned all the other children in the defendant's class, and all denied that the teacher had done anything to them. Faced with the "she said/he said" conflicting testimony, where the prosecution's only evidence would be the tenuous testimony of a scared, five-year-old girl, apparently the prosecution offered the defendant a plea bargain that looked enticing and led the defendant to assume that he could put all of this behind him if he just pled guilty. He did, only to have the plea bargain resurrect new charges from his past when the second complainant came forward. Although the defendant may have thought it looked like "*deja vu* all over again," this time the prosecution held all the cards. Because the article reported that both victims testified in the second case, I assume the court ruled that the prosecution could not introduce the defendant's plea bargained conviction *per se* as evidence that the defendant committed the allegations alleged in the second charge and that the court ruled the victim from the first case could take the stand and testify against the defendant.

I couldn't tell from the newspaper article whether the defendant took the stand in his own defense, and if he did, whether the prosecution was able to use the prior plea bargained conviction to impeach his credibility. I assume that the court ruled that the prosecution could use the plea bargained conviction to impeach the defendant's credibility if he took the stand. My initial reaction was to call one of the attorneys in the case to confirm my suspicions. It suddenly struck me though that it didn't matter. I reread the last paragraph of the article:

Clark pleaded guilty last spring to committing the lewd act on the first victim. The second victim came forward later, and Clark was convicted of the offense at a jury trial earlier this year where both victims testified.²⁴⁰

239. *Id.*

240. *Id.*

The defendant pled guilty, and the second victim came forward later. The cause and effect correlation was too strong to ignore. The second complainant had changed her mind and come forward primarily, if not exclusively, because of the plea bargained conviction.

Even if a court or legislature were to adopt my proposal and bar the use of the plea bargained conviction in any subsequent trial for child sexual abuse in which the underlying alleged facts pre-date the plea bargained conviction, to the extent that the plea bargained conviction itself increases the risk that other reluctant complainants may come forward and press charges against the defendant, when, if ever, should a defense attorney recommend that the client plead guilty to a charge of child sexual abuse? If the defendant pleads guilty to the charge, and other reluctant complainants learn about it, either through the press or from other sources, the plea bargained conviction would only encourage other reluctant complainants to come forward. The second time around, the prosecution has the upper hand. The prosecution has little incentive to plea bargain or even to offer a plea that would include probation. And as the newspaper account indicated, if the subsequent charge goes to trial and the defendant is convicted, the court will show no mercy. Just as was true with Ziggy, the defendant can count on receiving the maximum sentence. The increased risk of subsequent charges being brought, with the increased punishment any subsequent conviction may entail, might be enough to deter a defendant from plea bargaining even if the plea bargained conviction could not be used against the defendant.

But if society has a duty to mitigate the trauma child abuse victims suffer, shouldn't we encourage plea bargaining? In the case recounted in the newspaper article, if the defendant had not plea bargained the original charge, he probably would have been acquitted, the second victim would not have come forward, and he would be free to molest other children (assuming he in fact molested the children). Yet, by plea bargaining, he sealed his own fate.

We've created a system that appears to work only because defendants accused of child sexual abuse typically don't fully appreciate the risk of the reluctant complainant because they are represented by either inexperienced attorneys, attorneys who are not very good and therefore are desperate for work, or overworked public defenders. That doesn't sound like much of a criminal "justice" system to me. If the defense attorneys fully appreciated the risk of the reluctant complainant, few would plea bargain child sexual abuse cases, especially single complainant child sexual abuse cases. But who's the real loser then? Our children are, both those who have been abused but had the courage to come forward and those who are at risk of being abused.

I've often thought that children who are sexually abused are the ultimate "silent victims"—too afraid, too embarrassed, and/or too young to come forward. Now I worry about child abuse victims who will come forward, typically as a lone complainant, who will be forced to undergo the trauma of having to testify in court, of having to relive their experience and be subjected to cross-examination, only to have the defendant acquitted—all because the

criminal justice system, as currently structured, penalizes defendants who plea bargain child sexual abuse cases. Have we created a new class of "silent victims," victims of a criminal justice system that in its righteous rush to convict child molesters fails to consider the long term chilling effect its rules have upon a defendant's incentive to plea bargain? Maybe the criminal justice system isn't the right place to deal with the problem of child abuse. Maybe that's the only way truly to "protect and preserve our most valuable resource . . . our children."

Maybe Ziggy's case really was a "save the world" case after all, or at least a "save the children" case—I just didn't appreciate it at the time.²⁴¹

241. As something of an epilogue, to the extent that one might think that the facts in the hypothetical are rather extreme, the actual facts in the *Muthofer* case were in many respects even more egregious. The defendant was originally charged with one count of sexual abuse in the first degree, a class D felony in Missouri at the time (the lowest level felony). See MO. REV. STAT. § 566.100 (as originally enacted in 1977). To put the matter behind him, the defendant pled guilty to sexual abuse in the second degree, a class A misdemeanor at the time. See MO. REV. STAT. § 566.110 (as originally enacted in 1977). The fact that the defendant pled guilty to a misdemeanor made no difference though when the second set of charges were brought. Missouri permits the prosecution to use any prior convictions to impeach a witness' testimony if he or she takes the stand regardless of whether the conviction is a misdemeanor or felony or whether the crime involves dishonesty or a false statement. See MO. REV. STAT. § 491.050 (as originally enacted in 1952). The Missouri Supreme Court has construed Section 491.050 as conferring "an absolute right, in both civil and criminal proceedings, to impeach the credibility of any witness, including the accused, with his or her prior criminal convictions." See *M.A.B. v. Nicely*, 909 S.W.2d 669, 671 (Mo. 1995) (first emphasis added). The court went on to hold that the statute did not apply to convictions where imposition of sentence is suspended. *Id.* The state court cannot balance the prejudicial effect versus the probative value. To the extent the defendant in the *Muthofer* case wanted to make sure the jury did not learn of his prior conviction for sexual abuse with a child, the defendant had no choice but not to take the stand. As if that weren't enough, the trial court ruled that although the plea bargained conviction was not admissible substantively, the prosecution could call the child involved in the first case and have the child testify on the ground that the evidence didn't go to the character of the defendant but rather to his scheme of gaining the boys' trust and then abusing them. See *Missouri v. Muthofer*, 731 S.W.2d 504, 508 (Mo. Ct. App. 1987). Although the defendant was facing what amounted to life in prison, the defendant was denied his day in court because he had previously plead guilty to a misdemeanor on the assumption that in so doing he could put the whole matter behind him.

Most prosecutions for child sexual abuse occur at the state level, not the federal level. To the extent a state's rules of evidence are more like the Missouri rules than the federal rules, defendants who plea bargain child sexual abuse charges are even more at risk.

